(1)

Supreme Court, U.S.
FILED

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No. [redacted]

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

Isidoro Rodriguez, and his minor Son,
Isidoro Rodriguez-Hazbun

Petitioners,

v.

Amalin Hazbun Escaf,

Respondent.

On Petition For Writ of Certiorari
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE LOWER COURTS' NONCOMPLIANCE WITH THE MANDATES OF 28 U.S.C. § 2403(a), AND THE FEDERAL RULE OF APPELLATE PROCEDURE RULE 44, DENIED RODRIGUEZ AND ISIDORO ACCESS TO THE COURTS FOR A MEANINGFUL HEARING ON THEIR CONSTITUTIONAL CHALLENGES TO THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION DATED OCTOBER 25, 1980, T.I.A.S. No 11,670, 19 I.L.M. 1501 ("TREATY"), AND THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT, 42 U.S.C. SECTION 11601 *ET SEQ.* ("ICARA")?

II. WHETHER THE TREATY AND ICARA ARE UNCONSTITUTIONAL BECAUSE THEY VIOLATED RODRIGUEZ AND ISIDORO'S FUNDAMENTAL CONSTITUTIONAL RIGHTS AS U.S. CITIZENS: (i) IN A FATHER TO PROTECT AND TEACH HIS MINOR SON OF THE BENEFITS AND DUTIES OF BEING A U.S. CITIZEN; (ii) IN THEIR RIGHT TO HAVE ISIDORO REMAIN SAFE IN THE UNITED STATE WITH HIS FATHER; AND, (iii) IN THEIR RIGHT TO MAINTAIN AND PROTECT THE SOCIETY AND COMPANIONSHIP OF THEIR FATHER/SON RELATIONSHIP?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners ISIDORO RODRIGUEZ ("Rodriguez"), and his 13-year-old son, Isidoro Rodriguez-Hazbun ("Isidoro"),[1] requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), which has affirmed the Hon. Judge T.S. Ellis III, ("Judge Ellis"), U. S. Dist. Ct. E.D. VA, holding that the Treaty, and ICARA, have trumped Rodriguez and Isidoro's fundamental Constitutional rights as citizens of the United States to the society and companionship of their father/son relationship; assure Isidoro of the benefits, opportunities, duties and safety of the United States, and not forced to the Republic of Colombia ("Colombia"), and, assure their access to an impartial and meaningful hearing on these Constitutional issues.

OPINIONS BELOW

The unpublished orders of the Fourth Circuit, denying a Petition for Rehearing En Banc on January 7, 2003, is reprinted at A-1 [2], and the unpublished opinion of the panel of December 11, 2002, No. 02-1487, (A-2). The published opinions of Judge Ellis in *Hazbun v. Rodriguez*, 191F.Supp.2d 685 (E.D. Va. 2002), and *Hazbun v. Rodriguez*, 200 F.Supp2d 603 (E.D. Va. 2002), are at A-7 and A-24. The unpublished orders of Judge Ellis of June 10, June 6, and June 5, 2002, are reprinted at A-50, A-52, and A-54.

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[1] Pursuant to Federal Rules of Civil Procedure Rule 17(c) and S.Ct. Rule 12.4, Isidoro has been and is a party in interest because the proceedings below have also adversely affected his fundamental rights as a U.S. citizen.

[2] "A-" references are to pages in the Appendix filed with the Court. "App" refer to pages in the Joint Appendix filed with the Fourth Circuit. "Doc-" refer to the docket entries before Judge Ellis.

JURISDICTION

The judgment of the Fourth Circuit denying a Petition for Rehearing En Banc was entered on January 7, 2003 (A-1). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1).

Statement Required by S.Ct. Rule 29.4(b)

Pursuant to Rule 29.4(b), the Court is informed that 28 U.S.C. §§ 2403(a) applies. On February 19, and March 20, 2002. Rodriguez gave notice to Judge Ellis of Constitutional challenges to the application of the Convention and ICARA in litigation where the United States is not involved. Also pursuant to FRAP Rule 44. Rodriguez gave notice with to Fourth Circuit on May 9, and August 20, 2002 (A-58 and A-61). The Fourth Circuit certified with the U.S. Department of Justice ("DOJ") on August 20, 2002. However, given the "expedited" briefing schedule and the late certification notice, DOJ was precluded from filing any brief (A-63).

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STATEMENT OF THE CASE

Rodriguez and Isidoro

Rodriguez and Isidoro are U.S. citizens.[3] Due to his law practice, Rodriguez traveled frequently from Virginia to Colombia on a Business Visa from 1988 to 1993, and took up residence in Colombia from 1993 to 1999.[4]

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[3] On March 10, 1989, Isidoro was born in Colombia, and issued a U.S. State Department Certification of Birth Abroad of a Citizen of the United States pursuant to 8 U.S.C. § 1433 (App-157).

[4] In 1988, after serving as Assistant General Counsel for Morrison Knudsen Int'l. in Colombia, Rodriguez was retained by a U.S. investment/exploration group to provide *pro hac vice* fiduciary and legal service against Colombia in what U.S. Congressman Dan Burton described as the "largest private [contracts] claim by American citizens against a foreign state pending in the world . . . ." *Sea Search Armada vs. President of the Republic of Colombia*, Superior 3rd Judicial District of Barranquilla. *See also, Rodriguez v. HFP, Inc.*, 4CCA No. 03-1082 (filed 01/16/2003), suit to enforce Virginia Attorney's Lien on treasure trove, and for violation of Virginia's Business Conspiracy statute.

In August 1988, Rodriguez, married Ms. Amalin Hazbun Escat ('Hazbun"). In 1995, Rodriguez and Hazbun separated and entered into a verbal **divided custody** agreements (App-152, ¶8, App.135 to 136). In violation of the verbal agreement Hazbun filed a suit to seeking **sole custody** of Isidoro with the First Family Court of Barranquilla, Colombia,. The First Family Court of Barranquilla issued an *ex parte* order (App.-3, Doc. No. 8), restricting Rodriguez's access to Isidoro for only eight hours every other Saturday (App. 137). The First Family Court of Barranquilla refused to recognize the verbal **divided custody agreement** and all attempts to lift its *ex parte* order so to force Rodriguez to enter into a written **joint custody** agreement August 1, 1997, or in the alternative be faced with litigating the issue over many years, while the *ex parte* restriction stayed in place (App. 153 ¶13). Subsequently the First Family Court issued another *ex parte* order changing the **joint custody** to **sole custody** given to Hazbun (App. 158).

While the above custody litigation was occurring in April 1997, Hazbun sought to forcibly remove Rodriguez from Colombia by making false allegations with Colombian law enforcement. Furthermore, after his divorce in November 1997, Rodriguez had to fight off various physical attacks, and was the subject of various threats of kidnapping.

After returning to reside in Virginia in 1999, in February 2000, a threat of kidnapping was posted at the ranch of Rodriguez where both he and Isidoro stayed when together (App.-98 to App.-108, Defendant's Exhibit 4). The threat was sufficiently credible against Isidoro in Colombia that Rodriguez flew down from Virginia to Barranquilla, to participate in an operation with the Colombian Army anti-kidnapping unit to specifically protect Isidoro.

On April 17, 2001, the United States Department of State ("State Department"), issued a Warning to United States citizens against travel in and to Colombia, since,

> "[v]iolence . . .affects all parts of the country, both urban and rural. . . . **U.S. citizens of all age groups** and occupations, both tourist and residents, have been victimized. Bombing have occurred throughout Colombia. . . ." (Emphasis added).

Due to this increased violence in Colombia against U.S. citizens, and the direct threat Rodriguez has not been able to return to his ranch and/or office in Colombia since 2000. Thus based on Isidoro's desire to be with his father and his rights to live in the United States as a U.S. citizen, while residing in Virginia with his father, Isidoro filed *Master Isidoro Rodriguez-Hazbun, Petitioner,- v. Ms. Amalin Hazbun Escaf*, Case No. JJ-347-050-01-01, Juvenile and Domestic Relations Court of the County of Fairfax ("Fairfax Custody Court")(A-65)[5], seeking modification of the Joint Custody Agreement due to the increasing dangers and "zone of war" throughout Colombia, the repeated breach of the divided custody agreement by Hazbun, the cutting off all communications with by Hazbun as to the welfare and well being of Isidoro, the refusal by Hazbun to discuss with either Isidoro or Rodriguez, Isidoro's opinion and desire to remain in the United States, and Hazbun taking "home court advantage" in the Family Courts in Barranquilla so to deny Isidoro his right to express his wishes to live with his father.

On October 8, 2001, the State Department received Hazbun's request under the Treaty. In mid-October 2001 and January 3, 2002, pursuant to 51 Fed. Reg. 58. 10509, the State Department sent to the Fairfax Family Court the notice that a claim under the Treaty had been filed. Rodriguez responded that based on

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[5] The Fairfax Family Court proceeding has been stayed pending resolution of this action. Irrespective of the type of custody, under Colombia law both parents retain the right and responsibility for the care, control, protection and authority to make decisions concerning Isidoro. Unlike in the United States, Colombian domestic relations law the issues of support, custody and divorce are considered separately by different Family Courts, and there is no right of review or appeal.

Isidoro's fundamental rights as a U.S. citizen, the Treaty and ICARA do not apply.

On February 22, 2002, the State Department Advisory that the "security situation in Colombia [had] worsened in the aftermath of the collapse of peace talks between the government and rebels." (App.-147) On March 27, 2002, the State Department listing three (3) terrorist organization in Colombia, and in its Country Report on Colombia and in various warning to all U.S. citizens of all ages advised against being in Colombia due to the fact that "**there is a greater risk of being kidnapped in Colombia than in any other country in the world.**" (Emphasis added) (# 20, #27, and #33, App.146 and 148).

Proceedings Before Judge Ellis

In response to Isidoro's Complaint to modify the Custody Agreement, the instant federal Complaint was filed under the Treaty and ICARA on December 20, 2001.

A Motion to Abstain, and/or Dismiss pursuant to FRCP Rule 19, and a Motion for Sanctions under FRCP Rule 11, were filed on February 19, 2002, which challenged the Constitutionality of the Treaty and ICARA, stating that,

> the forcible return of [Isidoro under the Treaty and ICARA] would not be permitted under the fundamental rights granted to [Rodriguez] as a citizen of the United States. . . .. [and] . . . [Isidoro] who has . . . maturity to determine that his best opportunity for the future is to be gained from his studies, experience and opportunities as a U.S. citizen in the United States. (Doc. 5)

In seeking FRCP Rule 11 Sanctions, it was stated that,

> . . . [Isidoro] is by birth a United States citizen, and a citizen of the State of Virginia, and has fundamental rights to due

process and to be safe from the danger to U.S. citizens in the Republic of Colombia, pursuant to the U.S. Constitution. *See generally Reid v. Covert* 354 U.S. 1, 77 S.Ct. 2222 (1957), . . . and, that the forcible return of [Isidoro] to Colombia would not be permitted because of the fundamental principles of the United States of due process and equal protection of the laws granted to him as a United States citizen. . . . (Doc. 3)

After argument on March 18, 2002, Judge Ellis, denied these motions, *Hazbun v. Rodriguez*, 191F.Supp.2d 685 (E.D. Va. 2002)(A-7), stating that: (i) ". . . in passing, let me say that the child is not an indispensable party in the Court's view under Rule 19. Indeed, it's not a necessary party under the rules."[6] (App.-24, line 14); (ii) it had authority to order Rodriguez to send Isidoro to Colombia irrespective of his wishes as a U.S. citizen (App.-41, Line 6); and (iii) that neither the *Younger Abstention*, nor the *Colorado Abstention Doctrine* applied because it was Judge Ellis position the State Department notice under the Treaty to the Fairfax Family Court was *ex parte*, and thus the Treaty issue is not before the Fairfax Family Court (A-22). Despite the clear and repeated Constitutional challenge to Treaty and ICARA, Judge Ellis did not comply with the mandate of 28 U.S.C. § 2403(a), or even considered the challenge by not issuing any finding of fact or conclusions of law as required under FRCP Rule 52 (A-7 and A-24).

On March 20, 2002, Rodriguez filed an Answer and Affirmative Defense, again raising his Constitutional challenge to the Treaty and ICARA, by stating that,

pursuant to rights and limitations in the United States Constitution, and Art. 20 of the Convention, neither the United States Congress nor this Court has authority to order

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[6] Disregarding FRCP Rule 17(c). Judge Ellis stated he would deny any future motion for Isidoro to intervene.

Defendant as a United States citizen, to violate the fundamental right of father and son, so to direct that Defendant to send his son from the United States to the "zone of war" of the Republic of Colombia. (Doc. 18)

An expedited bench trial was ordered for March 25, 2002, providing for only 30 days of discovery. On April 12, 2002, and April 19, 2002, Judge Ellis further limited Rodriguez's rights to discovery by restricting the deposition of Hazbun to only issues presented under the Treaty (App.-8, Doc.46). Also, Judge Ellis without notice permitted another "volunteer" attorney with the National Center for Missing and Exploited Children to appear on behalf of Hazbun.

At the commencement of the bench trial held on April 25, 2002, Judge Ellis expressed clearly his subjective views regarding his preference for Hazbun and the use of the Treaty and ICARA, in this exchange with Rodriguez (App.-47, line 4),

> ATTORNEY RODRIGUEZ: Your Honor, I note to the Court, I requested [of] my Son [his opinion], and he adamant about the fact that he wishes to stay in the United States and wishes to proceed with the action that's in the Virginia State court, [once] we have to go beyond this action under the Treaty
> THE COURT: All right.
> ATTORNEY RODRIGUEZ: So, pursuant to that, I am compelled to, as his father, accede to his wishes.
> THE COURT: No, you are not compelled to accede to any wishes. I have been the father to two 13-year-old, and I never acceded to any of their wishes, because I knew what was best for them. That was my function as a parent.

Being limited to the procedures under the Treaty and ICARA, in establish the exception under Art. 13(b) of the Treaty (A-74), a timely motion for Judicial Notice of the worsening "zone of war" situation throughout Colombia was timely filed on April 24.

2002 (Doc. 51). At trial, Rodriguez called Mr. Tim Moore who testified as to the danger of kidnapping generally, and danger in Barranquilla (App.-61 to App.-69), Mr. Blair Sibley who too confirmed the physical danger for U.S. citizens (App.-74 to App.-90), and Mrs. Irene Rodriguez who confirmed the specific threat of kidnapping, and the increased "zone of was" throughout Colombia (App.-78 to App.-100). Finally, on cress Hazbun also confirmed the increasing "zone of war" in all Colombia, including Barranquilla (A135 to App.-136).

Regarding the exception under Art. 13¶3 of the Treaty (A-74), Rodriguez called Isidoro's math teacher at Mark Twain Middle School, Derek Steele, regarding Isidoro's maturity, who responded to Judge Ellis question as follows,

> A. My impression of him as a young man, he does the things that need to do. He is a very sharp young man in what he does . . . .**I think with his maturity level, he is one of those kids that, maturity-wise, he seems to have an understanding of life more than other kids.** (Emphasis Added) (App.-69 to App.-78).

Regarding Isidoro's own testimony as to his objecting to returning to Colombia and his desire to stay in the United States with his father, the following responses were made to the Judge Ellis,

> THE COURT: All right. And I read the letter that you wrote to your mother. Is it -- what is your desire about staying here or returning home?
> THE WITNESS: Right now, I want to live here with my dad for some time, and then maybe when things go better in Colombia, I can go to my mom's, one year there, one year here.
> THE COURT: Are you concerned about things in Colombia?

THE WITNESS: Colombia is in bad experience. Barranquilla is not doing well right now. Things have gone tense, because there was an attempt of assassination of the president, candidate. (App.-109 line 15)

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THE WITNESS: Because I want to live with my dad, and because I want to learn, you know, what my dad does, and I want to be in touch with him. Because six years, I stay with him one month each year. And plus, I want to be in a better opportunity for job careers than in Colombia. They are in depression. So it is like recession right now in Colombia.

THE COURT: You realize that you can do all of that once you get to be older and get into high school and college?

THE WITNESS: Yes.

THE COURT: But what I hear you saying is you want to be with your father now?

THE WITNESS: Yes.(App.-110, line 20)

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THE WITNESS: I spend six years in Colombia, then I spent six years in Colombia, but without my dad, and now I spend six years with my dad, like half and half, until I am eighteen.(App.-112, line 16)

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THE COURT: And tell me again, just in your own words, why you would like to remain in the United States.

THE WITNESS: Because -- first, because the danger in Colombia; and second, because there is more opportunities here for me to live here. And I think that it's time for me to live with my dad for some time. And I think that's one of the main reasons -- not one of; the main reason.

THE COURT: From listening to you, I sense that of those reasons, the most important is that you just want to be with your dad at this point in your life.(at App.-117, line 19)

In response to this testimony, Judge Ellis discussed both on and off the record his subjective opinion and experience of being

from divorced parents and growing up with his mother, as well as divorced and his leaving his sons with their mother to raise(App. 43, App140 to 141). Judge Ellis made clear that he was concerned neither about the increasing "zone of war" in all Colombia, nor of the fundamental rights of the father/son relationship, nor that Isidoro would be forced out of the United States and deprived of his rights as a U.S. citizen until he was 18 years of age (App.-115).

On May 6, 2002, Judge Ellis issued his decision *Hazbun v. Rodriguez*, 200 F.Supp2d 603 (E.D. Va. 2002)(A-24), ordering Isidoro immediate return to Colombia based on the Treaty, and refusing to take judicial notice of the rapidly worsening situation occurring in Colombia since January 2002, and based only on the testimony of Hazbun finding that Colombia was only dangerous for adult U.S. citizens. Again despite the clear and repeated Constitutional challenge to Treaty and ICARA, Judge Ellis did not comply with the mandate of 28 U.S.C. § 2403(a), or even consider the challenge by not issuing any finding of fact or conclusions of law as required under FRCP Rule 52 (A-46).

Only after Rodriguez argued and briefed his right to the automatic 10 day stay under FRCP Rule 62 (Doc. 54), did Judge Ellis grant a stay for the limited purpose of filing an expedited appeal and seeking a stay. Rodriguez filed a Notice of appeal with the Fourth Circuit on May 7, 2002, and a motion for a stay (4CCA No. 02-1487).

On May 22, 2002, the panel denied the motion to stay, but did grant an expedited appeal. On May 23, an Emergency Application for a Stay was addressed to the Honorable Rehnquist (S.Ct. No. 01A930), who denied the application on May 29, 2002. On May 31, 2002, a renewed application for a stay was submitted to the Justice O'Conner, who referred the request to the full Court, but was denied on June 10, 2002 (A-50, A-52, and A-54).

On June 11, 2002, Isidoro was forced to Colombia against his will and fundamental rights as a U.S. citizen based on the order of Judge Ellis.

The transcript was ordered on May 13, 2002, but inconsistent with The Court Reporter Guide to Judiciary Policies and Procedures, Chapter 20, Part 12, and Part 12.1.d, and The Guidelines for Preparation of Appellate Transcripts in the Fourth Circuit. Judge Ellis' Court Reporter failed to file a transcript until August 13, 2002, thereby denying its use during the above efforts to obtain a stay, and delaying the consideration of the "expedited" appeal.

Proceedings before the Fourth Circuit

Rodriguez raised his Constitutional challenge to the Treaty and ICARA pursuant to 28 U.S.C. § 2403 and FRAP Rule 44, in the notices filed May 9, and August 20, 2003 (A-58 and A-61), with the Fourth Circuit Clerk's office. However, the Fourth Circuit failed to timely certify the issue with the U.S. Department of Justice of the Constitutional challenge until August [illegible], 2002, precluding the Department of Justice from filing any b[illegible]f (A-65).

Rodriguez in his Brief and Reply Brief challenged the Constitutionality of the Treaty and ICARA used to shanghai Isidoro from the United States. However, during Rodriguez's oral argument on October 29, 2002, a judge on the panel voiced his surprise since he was lead to believe that this was just a Treaty case. On December 11, 2002, the Fourth Circuit Panel issued its order which begun with, "[t]his case is brought under the Treaty. . . ." (A-1). Thus to date the lower courts have assumed away and not addressed the Constitutional challenge.

Rodriguez and Isidoro's FTCA, *Bivens*, 42 U.S.C. §§1986 Action

Rodriguez and Isidoro filed an administrative claim pursuant to the Federal Tort Claims Act was filed on January 7, 2002, with an amendment on September 15, 2002.

On January 27, 2003, Rodriguez and Isidoro filed a suit in the United States District Court for the District of Columbia, *Isidoro Rodriguez, and minor son, Isidoro Rodriguez-Hazbun v. National Center for Missing and Exploited Children et al.*, D.C. Dist. Ct. No. 03-0120, Robert, J., for the alleged conspiracy to obfuscate and violate their fundamental rights under Amendments I, V and IX of the Constitution in their father/son relationship, access to the courts of the Commonwealth of Virginia and/or the federal courts to consider their Constitutional challenges to the Treaty, and equal protection and due process under Article 13b and 13¶ 3, and Article 20 of the Convention, so to expedite on June 11, 2002, the shanghaiing of Isidoro to Colombia, as well as for violation of 42 U.S.C. 1985 & 1986, based on denial of rights due to discrimination against their being Hispanic.

REASONS FOR GRANTING THE WRIT

This Court's review of the Fourth Circuit's decisions is warranted because the lower courts, (i) have entered a decision in conflict with the decisions of this court and other United States court of appeals on the protection of the fundamental Constitutional rights in the society and companion within the father/son relationship; (ii) has far departed from the accepted and usual course of judicial proceedings under 28 U.S.C. § 2403(a), thereby calling for an exercise of this Court's supervisory power; and (iii) has decided an important question that conflicts with decisions of this Court as to access to the courts and the rights' of U.S. citizens vis-a-via a treaty

I. NONCOMPLIANCE WITH THE MANDATE OF 28 U.S.C. § 2403(a), VIOLATED RODRIGUEZ AND ISIDORO'S RIGHTS TO ACCESS TO THE COURTS FOR A MEANINGFUL CONSIDERATION OF THEIR CONSTITUTIONAL CHALLENGES

To assure that always there is a full and meaningful consideration of any Constitutional challenges to their acts,

Congress through 28 U.S.C. § 2403(a) (2003)(A-72), has mandated that in any action in a court of the United States to which the United States is not a party, wherein the constitutionality of any Act of Congress is drawn into question, "the court **shall** certify such fact to the Attorney General, and **shall** permit the United States to intervene," so to present argument on the question of constitutionality. *See*. Note, *Federal Intervention in Private Actions Involving the Public Interest*. 65 Harv. L. R. 319.

As discussed above, under 28 U.S.C. § 2403(a) and FRCP Rule 44, Rodriguez in a timely fashion raised early and repeatedly his Constitutional challenges to the Treaty and ICARA (A-58 and A-61), *Max M. v New Trier High School Dist.* 859 F2d 1297 (7th Cir. 1988).

Once Rodriguez raised his Constitutional challenges it was the duty of Judge Ellis and the Fourth Circuit to comply with the mandate of 28 U.S.C. § 2403(a), by issuing a certification notice to the Attorney General so to leave to him the decision whether to intervene, thereby assuring a meaningful consideration and due process to Rodriguez and Isidoro. This mandate neither Court could ignore even if they viewed the challenges as frivolous or they intended to disposed of them on other grounds. *International Ladies' Garment Workers' Union v Donnelly Garment Co.* 304 U.S. 243, 58 S. Ct. 875 (1938); *Merrill v Addison* 763 F2d 80 (2nd Cir.1985); *Wallach v Lieberman*, 366 F2d 254 (2nd Cir. 1966).

However, the lower courts did not comply with this mandate, so to permit them to hold that ICARA and the Treaty controlled the litigation, and thereby assume away this Court and other Circuit Court's precedent as to Rodriguez and Isidoro's fundamental constitutional rights as U.S. citizen. Specifically, the lower courts circumvented the right to a full and fair meaningful hearing on the Constitutional challenges to the Treaty and ICARA by at no time requiring opposing counsel to address the Constitutional challenge, and by intentionally issuing a late certification notice depriving the United States to be heard on the issue (A-61).

Keyes v Madsen 179 F2d. 40 (1949, App. DC), *cert. den.* 339 U.S. 928, 70 S. Ct. 628 (1950).

Furthermore, since the Treaty and ICARA do not include a choice of law provision, the laws of Virginia control, *see Meddox v. American Airlines*, 298 F.3d 694, 699 (8th Cir. 2002); *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996). Also, under 42 U.S.C. § 11604(b)(A-76), Virginia law had to be complied with before Isidoro could be taken from Rodriguez. Thus Isidoro's preference as a 13-year-old boy to stay with his father had to be respected under VA Code §20-124(1) and (8)(A-78),[7] *Zambolin v. Hicks*, No. 1647-99-2 (VA Ct. of App., Dec. 28, 1999); *Bourne v. Frey*, No. 2565-93-4 (VA Ct. of App., Dec. 20, 1994). The Court under VA Code § 20-124.3(7), was required to consider Hazbun's refusal to participate in mediation or talk with Rodriguez, and insisted on only communicating by fax, as demonstrating a propensity to actively not support Isidoro's relationship with the Father and as an inability to cooperate, *Etter v. Etter*, No. 0506-97-4 (VA Ct. of App. May 5, 1998)(A-58, and A-153 ¶12).[8] However, by refusing to either abstain or interplead Isidoro, or follow Virginia law, Judge Ellis denied Rodriguez and Isidoro access to the court for a meaningful hearing of their Constitutional challenges.

"[T]he right to . . . defend in the courts," this Court stated long ago, "is the alternative of force. In an organized society it is the

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[7] As already noted Isidoro emphatically stated that, "I want to live with my dad, and because I want to learn, you know, what my dad does, and I want to be in touch with him. Because [for] six years, I [can only] stay with him one month a year. . . .(App-110, line 20).

[8] State Department regulations provide that, "[p]arties who enter into a private agreement concerning a child's custody have recourse under the Convention if those custody rights are breached. Article 3. . . . In the U.S. view, the provision should be interpreted expansively to cover more than only those agreements that have been incorporated in or referred to in a custody judgement. 51 Fed. Reg 58 (1986)

right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907). The right not only protects the ability to get into court, *see*, e.g., *Ex parte Hull*, 312 U.S. 546 (1941), but also ensures that such access is "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). Furthermore, this Court has stated that "[t]he fundamental requirement of due process is the opportunity to be heard `at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), the District Court was in error.

More recently, this Court stated that, "[w]hether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Warren Christopher, Former Secretary of State, et al. v. Jennifer K. Harbury*, 122 S. Ct. 2179 at 2185;153 L. Ed. 2d 413 (June 20, 2002). In short, one key standard is that any claim of being denied access to the courts for a meaningful hearing must show what underlying legal action, rights and remedies were frustrated by the denial. *Id.* 122 S.Ct at 2187.

In the proceeding below the rights and remedies of Rodriguez and Isidoro derived from their father/son relationship were repeatedly frustrated by the direct and purposeful effort to interfere with said fundamental constitutional rights, thereby by denying access to and meaningful consideration of the Constitutional challenge. Consequently, ICARA and the Treaty are unconstitutional as applied. Furthermore, because both lower court intentionally failed to comply with the mandate of 28 U.S.C. § 2403(a), the Court must order the United States to appear as a party to this proceeding and rule specifically on Rodriguez and Isidoro's constitutional challenges, *Pleasant-El v Oil Recovery Co.* (11th Cir. 1998) 148 F3d 1300; *Thatcher v Tennessee Gas Transmission Co.* (5th

Cir. 1950) 180 F2d 644, cert den. 340 U.S. 82, 971 S. Ct. 66 (1950).

II IN DISREGARDING THE FUNDAMENTAL RIGHTS OF RODRIGUEZ AND ISIDORO THE TREATY AND ICARA ARE UNCONSTITUTIONAL

In the proceedings below Rodriguez and Isidoro claimed their fundamental rights under the V and IX Amendments to the Constitution as U.S. citizens (A-72), including: (i) in the society and companionship of their father/son relationship, *Prince v. Massachusetts*, 321 U.S. 158 (1944),[9] *Troxel v. Granville*, 530 U.S. 57 (2000);[10] *Reno v Flores*, 507 U.S. 292, 301-302 (1993); *Franz v. United States*, 227 U.S. App. D.C. 385, 707 F.2d 582 (D.C. Cir. 1983);[11] (ii) to assure Isidoro of the benefits, opportunities, and duties of his U.S. citizenship, *Reid v. Covert*, 354 U.S. 1 (1957), *Yaser Esam Hamdi et al. v. Rumsfeld, et al.*, 4CCA 02-7338 (January 8, 2003); (iii) to assure that Isidoro be secure and not forcibly shanghaied from the United States to the "zone of was"

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In *Prince*, this Court stated that there is a constitutional dimension to the right of parents to direct the upbringing of their children, "[i]t is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166

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In *Troxel*, this Court held that due process clause of the Fifth Amendment guarantees more than fair process, that it has a substantive component that, provides heightened protection against government interference with the fundamental rights and liberty interests, and this includes the interest of a parent in the, "care, custody, and control of their children–[as] perhaps the oldest of the fundamental liberty interest recognized." *Id.* at 63

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In *Franz*, the D.C. Court of Appeals recognized the fundamentally constitutionally protected liberty interest of a father in the society and companionship of and the right to raise his minor child to assure the development of "parental and filial bonds free from government interference." *Id.* at 595.

throughout Colombia, where as a U.S. citizen he is increasingly exposed to the likelihood of being kidnaped and/or killed, *Friedrich v Friedrich*, 983 F.2d 1396 (6th Cir. 1993), and *Id*, 78 F.2d 1060 (6th Cir. 1996); *see also*, *Nwaokolo v. INS*, 314 F.3d 303 (December 27, 2002);[12] and (iv) to access to the courts of the Commonwealth of Virginia and the federal courts to obtain a meaningful hearing so to protect said fundamental rights and his minor son, *Terry E. Butera v. District of Colombia et al.*, 235 F.3d 637 (2001); *Christopher v. Harbury*, 536 U.S. 403, Sct. 01-394 (2002).

Despite the above precedent the lower courts assumed away these fundamental rights based on the Treaty and ICARA. (A-6 and A-46).

A. The Treaty and ICARA do not trump the fundamental Constitutional rights of a U.S. citizen under the V and IX Amend.

Regarding a U.S. citizen's fundamental rights vis-a-vis the operation of a treaty, in *Doe v. Braden*, 57 U.S. (16 How.) 635, 656 (1853), this Court held that U.S. courts have a legal "right to annul or disregard" the provisions of a treaty if "they violate the Constitution of the United States." Also this Court has declared that "a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1871). In *Geoffrey v. Riggs*, 133 U.S. 258, 267 (1890), this Court found that the federal government's treaty power does not enable it "to authorize what the Constitution forbids." Later cases, such as *U.S. v. Wong Kim Ark*, 169 U.S. 649, 700 (1898), and *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924), this court

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[12]In *Nwaokolo*, the Seventh Circuit denied the deportation of a mother based on the fundamental rights of her U.S. citizen child to be safe from the high probability of harm. *Id.* at 314

reiterated the point that constitutionally protected rights are sheltered from the domestic effect of treaties.[13]

In *Reid v. Covert*, 354 U.S. 1, 77 S.Ct 1222 at 1225(1957), this Court specifically held that the provisions of the Constitution which are designed to protect the fundamental rights of a U.S. citizen from government infringement (chiefly the Bill of Rights), apply to the power of the federal government in foreign no less than in domestic affairs. Furthermore, the prohibitions of the Constitution were designed to apply to all branches of the National Government, **including the judicial branch**, and cannot be nullified, *Id* at 1230. This Court reaffirmed that it "has regularly and uniformly recognized the supremacy of the Constitution over a treaty," and that,

> there is nothing in [the Constitution's] language which intimates that treaties do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggest such a result . . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the bill of Rights–let alone to our entire constitutional history and tradition–to construe Article VI [re treaties] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V [re the amendment process].

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On this issue Thomas Jefferson, wrote that, "[o]ur particular security is in possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty making power as boundless. If it is up to them we have no Constitution." Letter to Wilson Cary Nicholas, September 1803, *Jefferson Writings* (New York: Library of America, 1984), p. 1139.

Thus the Constitution does not authorize Congress to enlarge or abridge the fundamental rights of citizens, *Schneider v. Rusk, Secretary of State*, 377 U.S. 163; 84 S. Ct. 1187 (1964). Consistent with this holding, the Ninth Circuit recently held that even a naturalized citizen cannot be denied of their rights as citizens,[14] stating that,

> Citizenship in the United States of America is among our most valuable rights. For many of us, it is all that protects our life, liberty, and property from arbitrary deprivation. The world is full of miserable governments that protect none of these rights. Many of us would be dead or never conceived in wretched places in other countries, had we or our ancestors not obtained American citizenship. The opportunities that we want to pass on to our children depend on their secure rights to stay in this country and enjoy its guarantees of life, liberty, and property, and the domestic peace and prosperity that flow from those guarantees. *Gorbach, et al. v. Reno*, et al., 219 F.3d 1087 at 2005 (9th Cir. 2000).

Consequently, the Treaty and ICARA are unconstitutional because this Court stated that the "[r]ules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them." *Boos v. Barry*, 485 U.S. 312, 324 (1988).

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[14]Thus with the exception of when there are acts which would justify expatriation under 8 U.S.C 1481, or acts of treason. *Yaser Esam Hamdi Esam Rouad Hamdi v. Donald Rumsfeld et al.*, 316 F.3d 450(4th Cir. 2003), because as recently stated by the Fourth Circuit, "[t]o deprive an American citizen of [the] protections [of the Constitution] is not a step any court would casually take." *Id.* at 4722.

B. Neither Congress nor the Court have authority to "deport" a U.S. citizen guilty of no crime.

Under Art IV, sec. 2, cl. 2, the Constitution only provided Congress with authority to deliver up a fugitive from justice, 1 Stat. 302 (1793), 18 U.S.C. §3182; *Melia v. United States*, 667 F.2d. 300 (2d Cir. 1998), thus the Constitution did not grant Congress or the Courts any authority to take out of the United States Isidoro against his objections or his fundamental rights.

Thus Treaty and ICARA as applied are unconstitutional because the District Court was without authority to have ordered Rodriguez to hand over of Isidoro to the Court under the threat of contempt (A-54), so to permit the shanghaiing of Isidoro to Colombia.

C. Judge Ellis Denied Rodriguez and Isidoro Their Constitutional Rights in not Abstaining under *Younger* Doctrine, or Not Interpleading Isidoro under FRCP Rule 19(a)(2).

Isidoro filed a suit in the Fairfax Family Court on July 13, 2001(A-65). Pursuant to 51 Fed. Reg. 10,509 (1986), the State Department issued a Hague Notice letter to the Fairfax Family Court on October, 2002, and again on January 3, 2002. Subsequently, this action was filed, and disregarding both the original proceeding before the Fairfax Family Court and the State Department's notice, Judge Ellis denied a motion to abstain, or in the alternative dismiss for failure to name Isidoro as an indispensable party, or to permit Isidoro to intervene (A-7).

i. *Younger* Analysis

Under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 27 L.Ed. 2d 669 (1971), abstention is appropriate when three conditions are met: (i) where there is an ongoing state judicial proceeding; (ii) where the proceeding implicates important state interest; and (iii) where there is an adequate opportunity to present the federal claims

in the state proceeding. *Employers Res. Mgmt Co. v. Am Employer Benefit Trust*, 65 F.3d 1126 at 1134 (4th Cir. 1995).

All three elements were present in this action: first, there was an earlier filed Virginia Family court proceeding in which there was issued State Department notice of the Treaty; second, because the procedures under ICARA and the Treaty are not structured to protect the fundamental Constitutional rights of Isidoro and Rodriguez, Virginia proceeding implicated an important state interest under Va. Code 20-124.4 (A-78); and third, Hazbun who appeared in the Virginia proceeding has an opportunity to argue the Treaty claim.

Recently, the Fourth Circuit stated in *Nivens v. Gilchrist*, 4CCA No. 02-1176 (decided February 11, 2002), that, "a federal court must abstain from interfering with an on going state proceeding where the litigant has 'an opportunity to raise and have timely decided by a competent state tribunal the federal issues involved' and . . . no bad faith, harassment, or other exceptional circumstances dictate to the contrary. *Middlesex [County Ethics v. Garden State Bar Ass'n]*, 457 U.S. 423 at 437 (1982) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973))." Thus Judge Ellis based on the application of the Treaty and ICARA denied constitutional rights by not abstaining.

ii. Dismissal or permitting Isidoro to interplead under FRCP 19

FRCP Rule 12(b)(7) authorizes a motion to dismiss a complaint for failure to join a "needed" party under FRCP 19(a). *Ricci v. State Bd of Engineers*, 569 F.2d 782 (3rd Cir. 1978), whose interest in the dispute is such that to proceed in his absence might prejudice him. *McDonald v. General Mills, Inc.*, 387 F.Supp. 24, 37 (Ed Ca., 1974). FRCP 19(a)(2), requires joinder of Isidoro as one who claims an interest relating to the subject of the action and who is so situated that the disposition of the action in his absence may impair his ability to protect his interest as a U.S. citizen to stay in the United States.

Isidoro is an indispensable party since it is also his rights as a U.S. citizen which are adversely affected by the seeking to shanghai him to Colombia until he is 18 years of age. *Aquilar v. Los Angeles*, 751 F.2d 1089 (9th Cir. 1985), *cert. denied* 105 S.Ct. 2656, 86 LE2d 273. Regarding the ability of Rodriguez to protect Isidoro's interest, the determination must be made "as a practical matter." *Provident Tradesmens Bank & Trust Co. v. Patterson.*, 390 U.S. 102, 110; 88 S.Ct 733 (1968), and since consideration was limited to the Treaty and ICARA, the practical results of the judgment prejudice Isidoro's interests, thus the requirement of FRCP Rule 19(a)(2)(i) is satisfied, *Shutten v. Shell Oil Co.*, 421 F.2d 869 (5th Cir. 1970); *Owens-Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185 (3rd Cir. 1979).

However, both on and off the record Judge Ellis stated that irrespective of the fact Isidoro would not be permitted to return to the United States until he became 18-years-old, the Court could and would force Isidoro out of the United States by issuing a contempt order against his father (A-7, and A-50, A-52, and A-54). Thus despite Isidoro and his Father's objections, Judge Ellis knowingly deprived Isidoro of his fundamental rights to liberty without due process, *Kent v. Dullus*, 357 U.S. 116 (1957), and benefits and protections of his citizenship under V and IX Amendments to the U.S. Constitutions until 2008, by trumping said rights by only considering issues raised under ICARA and the Treaty. Judge Ellis's denial of due process and equal protection of the laws based on the Treaty and ICARA, so to "deport" Isidoro is even more disturbing given that the Supreme Court in *Bridges v. Dixon*, 326 U.S. 135, 154 (1946), has granted even Aliens facing removal from the United States due process (*see also, Cholmos v. United States Dept. of Justice, INS*, 220 516 F.2.d 310, 313 (3d. Cir. 1999)), stating that,

> [t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives, him of the right to stay and live and work in this land of freedom. **That deportation is a penalty–at times a most serious one–cannot be doubted.** Meticulous care must be

exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

D. The Lower Courts Denied Rodriguez and Isidoro of Due Process by Refusing to Follow State Department Warnings and Other Circuit Precedent Granting Judicial Notice of the Escalating "Zone of War" in All of Colombia.

i "Zone of War" Exception

Regarding the exception to the Art. 13(b) of the Treaty (A-74), under 42 U.S.C. § 11603(e)(2)(A) (A-76), all other circuits, including Fourth Circuit in *Miller v. Miller*, 240 F.3d 392 (4th Cir. 2001), have followed the Sixth Circuit holding in *Friedrich v. Friedrich*, 78 F.2d 1060 at 1069 (6thCir. 1996), which states that,

> [A] grave risk of harm for purposes of the Convention can exist only [when]. . . there is a grave risk of harm when the return of the child puts the child in immediate danger *prior* to the resolution of the custody dispute–e.g. **returning the child to a zone of war**.... (Emphasis added)

As one recent commentator noted, "[t]his exception [under Art. 13(b)] would include situations such as returning a child to a nation gripped in war. . . ." Nelson, *Turning our backs on the Children: Implications of Recent Decisions Regarding The Treaty on International Child Abduction."* 2001 Univ. Ill. 669 (2001) at p.676.

The State Department has stated that Colombia is "one of the most dangerous places in the World." State Department Pub. #10407, and has warned U.S. citizens of all ages from traveling there. As the Fourth Circuit recently held, the Executive Branch conclusions are to be followed since it is "in the best position to appraise the status of a conflict,"*Yaser Esam Hamdi et al. v. Rumsfeld, et al.*, at 52, 4CCA 02-7338 (January 8, 2003), citing *United State v. The Three Friends*, 166 U.S. 1, 63 (1897)("[I]t

belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."). *See also*, *INS v. Fredy Orlando Ventura*, 123 S.Ct. 353 (November 4, 2002).

Although it is true that because the Treaty and ICARA do not specifically define "grave risk," the courts have experienced a free-for-all as they try to find what fits under the exception (*Bondin v. Dubois*, 78 F.Supp2d 283, 297 (S.D.N.Y. 2000) (*Blondin III*); *Walsh v. Walsh*, 221 F.3rd 204, 218-219 (1st Cir. 2000) (*Walsh II*), there is no legal or factual precedent to support Judge Ellis's holding (A-45), and the Fourth Circuit affirming (A-2), that although Colombia is in the midst of a internationally recognized civil war, and that all adult U.S. citizens are in constant danger of either kidnapping or death, that there be a specific showing that Isidoro as a U.S. citizen child would be in grave risk in Colombia and Isidoro should be returned there to maintain the *status quo*. However, very relevant to the issue of maintaining the *status quo* envisioned in a static world under the Treaty is a response to the key question-- how is Rodriguez to go to Colombia to litigate the custody issue pursuant to Isidoro's wishes, if it is too dangerous generally for U.S. citizens, and for him specifically under a threat of kidnapping by FARC?

This not only defies the State Department's expressed warnings to "U.S. citizens of all ages", and this court's precedent on the judicial branch recognition of the Executive Branch finding on conditions in a foreign county, but too the clear testimony of Tim Moore, Blair Sibley, Irene Rodriguez, and even Hazbun.

ii. <u>The Denial of due process by the refusal to take judicial notice.</u>

Pursuant to FRCP Rule 52(b)(A-74), Rodriguez challenged the sufficiency of evidence supporting Judge Ellis finding of fact that Colombia was safe for Isidoro as a U.S. citizen minor.

Given the effective denial of meaningful discover by the expedited procedure Judge Ellis imposed based on ICARA and the

Treaty, including the inability to take the deposition and testimony of officials of the State Department on its Travel Warnings for Colombia, April 17, 200; Public Announcement of the security situation in Colombia, February 22, 2002; and, its designation of Foreign Terrorist Organization, March 27, 2002, judicial notice was required of the news media reports on the rapidly deteriorating situation in Colombia.

Precedent in other Circuits have held specifically because of the rapidly deteriorating situation in Colombia the use of judicial notice is appropriate. The Second Circuit in *Irragorri v. United Technologies Corp. and Otis Elevator Co.*, 274 F.3d 65, 75 (2nd Cir. 2001) (*en banc*), and the Sixth Circuit in *Bridgestone Firestone, Inc. Tires Products Liability Litigation*, Order Denying Defendant Ford and Firestone's Motions to Dismiss Colombian and Venezuelan Cases on Ground of *Forum Non Convenience* at 31-33, J.P.M.L. No. 1373 (S.D. Ind. Mar. 25, 2002), took judicial notice of the State Department's announcements, news articles and Internet web sites concerning the recent increased dangers in Columbia. As they noted this is because recent numerous terrorist events in Colombia are only reported in the news media, *see* of *Silverman v Silverman*, 2002 WL 971808 (D. Minn. May 9, 2002).

Thus given that all of Colombia is in the midst of war. such that neither the Army or Police, much less the Court can protect their own citizens, the lower courts' refusals to take judicial notice are a violation of the constitutional rights of Rodriguez and Isidoro to be secure in the United States.

E. The Lower Courts Unconstitutionally Failed to Respect the Objections of Rodriguez and Isidoro's Determination to Stay in the United States Based on Judge Ellis' Subjective Opnion.

Judge Ellis expressed a clear subjective preference for Hazbun's use of the Treaty and ICARA to control the proceedings irrespective of the danger in Colombia, and that he was not going to

listen to either the objections of Isidoro or his Father on the issue of the fundamental right to teach Isidoro the rights and duties of being a U.S. citizen, or to protect Isidoro, or Isidoro's fundamental right to stay and enjoy the benefits and opportunities of being in the United States with his father.

This Court stated in *Troxel*, 530 U.S. at 67, that when a fit parent's decision of the kind at issue here "becomes subject of judicial review, the court must accord at least some special weight to the parent's own determination." Also Isidoro's opinion must be taken into account under both Virginia law, given Judge Ellis was effectively deporting him to Colombia until he is 18 years old, and thereby depriving him of his liberty and rights as a U.S. citizen based on Hazbun's manipulation of the judicial process in Colombia and in the United States. Justice Stevens stated in *Troxel*, *Id.* at 74,

> [w]hile this Court has not yet had occasion to elucidate the nature of a child's liberty interest in preserving established familial or family-like bonds [*Michael H. v. Gerald*, 491 U.S. 110 at 130 (1989)](reserving the question), it seems to me extremely likely that to the extent parents and families have fundamental liberty interest in preserving such intimate relationships, so too, do children have these interest, and so, too, must their interests be balanced in the question. . . . **The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by the interest in the welfare of the child**. (Emphasis added)

In *Marbury v. Madison*, 5 U.S. 137 (1803), this Court recognized that inherent in every judicial decision was a deceleration and interpretation of the relevant general principles of law. "It is emphatically the providence and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 177.

Fundamental to this decision making process was that the enunciated law be subsequently applied to subsequently similarly situated litigants. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

Indeed, this principle of reliance upon enunciated precedent is at the backbone of our legal system. As stated by Justice Joseph Story, *Commentaries on the Constitution of the United States* §377-78 (1983),

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedent and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. **It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.** (Emphasis added)

Thus the subjective views of Judge Ellis clearly violated the above cited relevant precedent as to Rodriguez and Isidoro's fundamental Constitutional rights, because as noted even judges cannot violate the protections in the Constitution based on their subjective views, *Reid v. Covert*, 77 S.Ct at 1230.

F. The Lower Courts use of *Comity* Violated Fundamental Rights of Rodriguez and Isidoro

The Supreme Court established an American federal common law doctrine grounded on the principles of international

comity. The Court held that comity itself reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In *Miller v. Miller*, 240 F.3d 392 at 397(4th Cir. 2001), it was stated that "comity is at the heart of the Treaty." However to be granted comity, or respect, a judicial or administrative decision must be rendered after a **fair trial by a court having jurisdiction of the parties and issues**. *Ingenohl v. Olsen & Co.*, 273 U.S. 541 (1927).

In Colombia, the State Department's Country Report at page 21, recognizes that generally, "the suborning or intimidation of judges . . . is common." Also in this action there has been a pattern and practice of the Colombian courts and administrative agencies to violate Rodriguez's rights to a fair hearing because he is U.S. citizen: refusing to consider the verbal divided custody agreement, issuing *ex parte* orders changed the joint custody to sole custody, and refusing to hear Isidoro on his preference to be with his father. Thus as applied the Treaty and ICARA are unconstitutional.

CONCLUSION

For the above reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

(2)

No. 02 1268 FEB 25 2003

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

Isidoro Rodriguez, and his minor Son,
Isidoro Rodriguez-Hazbun

Petitioners,

v.

Amalin Hazbun Escaf,

Respondent.

On Petition For Writ of Certiorari
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 7, 2003

No. 02-1487
CA-01-1926-A

AMALIN HAZBUN ESCAF

Petitioner - Appellee

v.

ISIDORO RODRIGUEZ

Respondent - Appellant

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMALIN HAZBUN ESCAF, Plaintiff-Appellee,		
v.		No. 02-1487
ISIDORO RODRIGUEZ, Defendant-Appellant.		

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
T. S. Ellis, III, District Judge.
(CA-01-1926-A)

Argued: October 29, 2002

Decided: December 11, 2002

Before WILKINS, MICHAEL, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

COUNSEL: Isidoro Rodriguez, THE RODRIGUEZ LAW FIRM, Alexandria, Virginia, for Appellant. Patrick Hanley Stiehm, STIEHM LAW OFFICE, Alexandria, Virginia, for Appellee. **ON BRIEF:** Stephen J. Cullen, MILES &STOCKBRIDGE, P.C., Towson, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

This case is brought under the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501 (Hague Convention). Isidoro Rodriguez appeals the district court's order requiring (pursuant to the Hague Convention) the return of his thirteen-year-old son, Isidoro, to Colombia, Isidoro' s country of habitual residence and the residence of his mother. We affirm.

I.

Amalin Hazbun Escaf (Hazbun), a Colombian citizen, married Isidoro Rodriguez (Rodriguez), a U.S. citizen, in Colombia in 1988. They lived in Barranquilla, Colombia after the marriage. In 1989 the couple had a son, Isidoro Rodriguez Hazbun (Isidoro), and Isidoro has joint Colombian-U.S. citizenship. Hazbun and Rodriguez divorced in 1997, and both continued to live in Barranquilla. Rodriguez claims that he and Hazbun had an initial oral agreement providing that Isidoro would split his time evenly between his parents; Hazbun disputes this. In August 1997 a Colombian family court approved a different custody agreement entered into between Hazbun and Rodriguez. The court-approved agreement provided that Isidoro would live primarily with his mother, but would spend every other weekend with his father.

Rodriguez returned to the United States in January 2000, taking up residence in Virginia. Later in 2000 Isidoro spent summer and Christmas vacations with Rodriguez in the United States. After Isidoro returned to the United States for a visit during the summer of 2001, Rodriguez filed (in Isidoro's name) a petition for a change of custody in the Fairfax County, Virginia, Juvenile and Domestic Relations Court. Rodriguez then sent a

facsimile transmission to Hazbun, telling her that Isidoro would be staying in the United States and would not be returning to Colombia. Included in the transmission to Hazbun was (1) a letter from Isidoro to his mother, saying that he wanted to stay with his father and (2) a copy of the petition for change of custody.

In August 2001 Hazbun filed a Hague Convention Return Application with the Colombian Civil Authority, seeking Isidoro's return to Colombia under the Hague Convention. In December 2001 Hazbun sued Rodriguez in federal court in the Eastern District of Virginia, asking for an order requiring Isidoro's immediate return to Colombia under the Hague Convention and its implementing legislation, 42 U.S.C.A. § 11601 et seq. (West 1995 & Supp. 2002).

Rodriguez filed a motion to dismiss Hazbun's complaint, raising several issues that were thoroughly considered by the district court. First, the district court rejected Rodriguez's argument that it lacked subject matter jurisdiction, concluding that jurisdiction was proper under 42 U.S.C.A. § 11603(a). Second, the district court rejected Rodriguez's argument that Isidoro was an indispensable party in the federal lawsuit and that the failure to join him was grounds for dismissal. Because a Hague Convention proceeding deals with the rights of those claiming custody, Hazbun and Rodriguez in this case, the court determined that it could afford complete relief to the parties without joining Isidoro. The court thus concluded that Isidoro was not an indispensable party, although the court was careful to note that his rights and wishes could be taken in account. Third, the district court rejected Rodriguez's arguments that it should abstain from deciding the Hague Convention case while a state custody proceeding was pending. The court determined that *Younger v. Harris*, 401 U.S. 37(1971), did not require it to abstain. The court noted that *Younger* calls for federal courts to abstain from decision when (1) a concurrent state proceeding is pending, (2) an important state interest is implicated, and (3) the

parties may seek review of their federal claims instate court. The court concluded that Rodriguez's argument failed on the second Younger requirement because Hague Convention cases implicate only the international movement of children, which is a federal, rather than a state, interest. The district court also declined to abstain based on *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), which applies only when ongoing federal and state proceedings are parallel. Because the federal and state proceedings here do not involve the same parties and issues, the court concluded that they are not parallel and that *Colorado River* does not apply.

After denying Rodriguez's motion to dismiss, the district court held a bench trial to determine whether Isidoro had been "wrongfully removed or retained in" the United States, a country that is a party to the Hague Convention. In its final opinion, which set forth findings of fact and conclusions of law, the district court found that Colombia was Isidoro's habitual residence and that he had been wrongfully retained in the United States. The court then considered and rejected possible defenses to Hazbun's claim that Isidoro should be returned to Colombia. First, the district court determined that Rodriguez had not presented clear and convincing evidence that Isidoro would be at grave risk if be returned to Colombia. Second, the court determined that Isidoro who said that his preference was to remain in the United States for now, but that later he wanted to spend equal time in the United States and Colombia was not of a sufficient age and maturity for his views to be given conclusive weight. The district court ultimately concluded that the Hague Convention and 42 U.S.C.A. 11603 et seq. required that Isidoro be returned to Colombia forthwith, and an order to that effect was entered. After Rodriguez was unsuccessful in his efforts in this court and in the Supreme Court to obtain a stay pending appeal, Isidoro was returned to Colombia on June 11, 2002, pursuant to the district court's order.

II.

Rodriguez appeals, challenging the district court's decision that Isidoro is not an indispensable party, its refusal to abstain, and its determination that Rodriguez did not establish a defense under the Hague Convention. Rodriguez also asserts that the proceedings in district court violated his parental rights and Isidoro's due process rights.

The district court noted that this case arises from "an exceptionally difficult situation" for Isidoro and for the parties. We agree. Accordingly, we have carefully considered the briefs, the joint appendix, and the oral arguments. We conclude that the proceedings in district court did not violate either Rodriguez's or Isidoro's rights. As to the other issues, we affirm on the reasoning of the district court. See *Hazbun v. Rodriguez*, 191 F. Supp. 2d 685 (E.D. Va. 2002) (opinion denying motions to dismiss); *Hazbun v. Rodriguez*, 200 F. Supp. 2d 603 (E.D. Va 2002) (memorandum opinion containing findings of fact and conclusions of law).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

AMALIN HAZBUN ESCAF,	)
Petitioner,	)
	)Civil Action No. 01-1926-A
	)(191 F.Supp 2d 685-
	) E.D.Va 2002)
ISIDORO RODRIQUEZ,[1]	)
	)
Respondent.	)

MEMORANDUM OPINION

Amalin Hazbun Escaf brought this suit under the Hague Convention on the Civil Aspects of International Child Abduction[2] (Hague Convention) and the International Child Abduction Remedies Act[3] (ICARA) to secure the return of her son to Colombia from the keep of Isidoro Rodriguez Cruz, the

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1

The caption of the complaint lists respondent's name as "Rodriquez" with a "q," but all other pleadings spell the name "Rodriguez" with a "g". The more common "Rodriguez" spelling will be used here in all instances except in the caption.

2

Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 1988 WL 411501 (entered into force Dec. 1, 1983; for the United States July 1, 1988; for Colombia March 1, 1996; between Colombia and the United States June 1, 1996).

3

42 U.S.C. § 11601 Ct seq. The statute implements the Hague Convention in the United States and specifically states that its provision "are in addition to and not in lieu of the provisions of the Convention." 42 U.S.C. § 1 1601(b)(2).

child's father. Central to the resolution of the pending motion is whether the *Younger*[4] or *Colorado River*[5] abstention doctrines counsel that this case be stayed or dismissed[6] in favor of a child custody matter pending in Virginia state court, in which the Hague Convention issue has not been formally raised.

I.[7]

The child in issue here is Isidoro Rodriguez Hazbun, a thirteen-year-old boy born in Barranquilla, Colombia[8] on March 10, 1989 to petitioner Amalin Hazbun Escaf (Hazbun), a citizen and resident of Colombia, and her then husband, respondent

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[4]*Younger v. Harris*, 401 U.S. 37 (1971).

[5]*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

[6]*Younger* abstention contemplates the dismissal of the federal suit and the presentation of all claims to the state court. *See Gibson v. Beriyhill*, 411 U.S. 564, 577 (1973). *Colorado River* abstention may result either in a stay or outright dismissal of the federal suit, *see Moses H. Cone Mem 'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13—16 (1983), but in either case the state court decision will have preclusive effect. *See Wilton v. Seven Falls Co., 515* U.S. 277, 283—85 (1995).

[7]It is proper to consider matters outside the pleadings for purposes of a motion to dismiss that is based on (i) a challenge to the Court's subject matter jurisdiction; (ii) failure to join a necessary and indispensable party; or (iii) abstention. *See* Fed. R. Civ. P. 12(b); *Hammond v. Clayton*, 83 F.3d 191, 192 (7th Cir. 1996). Accordingly, the facts recounted here are those uncontested facts taken from the pleadings and accompanying affidavits.

[8]The child is an American citizen by virtue of his father's citizenship.

Isidoro Rodriguez Cruz (Rodriguez), an American citizen now residing in Virginia.[9] For approximately six years, the family resided in Barranquilla, making occasional trips to the United States. Then, in *1995,* Hazbun and Rodriguez separated, ultimately divorcing in 1997. During the period of the separation, the child, Isidoro, resided chiefly with Hazbun in Barranquilla. In two separate decrees issued in August 1997, several months before the divorce, the Family Court of Barranquilla, Colombia approved a custody agreement in which the child would reside with and be primarily in the care of Hazbun, but would spend every other weekend with Rodriguez[10]. The summer holidays were to be divided evenly with Isidoro spending equal time with each parent. Both parents were to share the right and responsibility for the education and the moral and intellectual upbringing of their child. In this regard, Rodriguez was to retain certain responsibilities for taking Isidoro to evening sports practices and academic lessons. The Barranquilla Family Court clarified in a second order that Hazbun retained formal custody of Isidoro[11].

It appears from the record that some time after the divorce Rodriguez began to spend most of his time in Virginia, and Isidoro made annual trips to this country during the summer to spend time with his father in Virginia. During the last of these trips, in June and July of 2001, Isidoro allegedly determined that he wanted to stay in the United States and not return to Colombia. Since then,

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9

Rodriguez worked for many years in Colombia and maintains law offices in Alexandria, Virginia and Barranquilla, Colombia.

10

See Ama/in Hazbun Escaf v. Isidoro Rodriguez Cruz (First Family Court, Barranquilla, Colombia Aug. 1, 1997).

11

See Amolin Hazbun Escaf v. Isidoro Rodriguez Cruz, Ref No. 23.833 (First Family Court, Barranquilla, Colombia Aug. 26, 1997).

Isidoro has remained in the United States in the care of Rodriguez and in violation of the custody orders of the Barranquilla Family Court.

In July 2001 Isidoro filed suit against his mother in the Fairfax County Juvenile and Domestic Relations Court[12] to modify the custody agreement between Hazbun and Rodriguez based on a material change of circumstance. Specifically, the petition seeks an order that Rodriguez be granted sole custody of Isidoro and that Isidoro not be required to return to Colombia. In turn, Hazbun filed this suit against Rodriguez on December 20, 2001 seeking return of the child under ICARA and the Hague Convention. Rodriguez has now filed a motion to dismiss (i) for lack of subject matter jurisdiction[13], (ii) for failure to join the child as an indispensable party,[14] and (iii) for abstention pursuant to *Younger*[15].

II.

The Hague Convention establishes legal rights and procedures for the prompt return of children who have been "wrongfully removed to or retained in" a nation that is a party to the Convention. Hague Convention, art.1; 42 U.S.C. 11601(a). The nations that adopted the Hague Convention sought "to protect children internationally from the harmful effects of their

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[12]*Isidoro Rodriguez-Hazbun v. Amalin Hazbun Escaf,* Case No. JJ-347-050-01-01 (Juv. & Dom. Rel. Ct. of Fairfax Cty, filed July 13, 2001).

[13]*See* Rule 12(b)(1), Fed. R. Civ. P.

[14]*See* Rules 12(b)(7) & 19, Fed. R. Civ. P.

[15]Also pending is Rodriguez's motion for Rule 11 sanctions. Given the resolution of the underlying motion to dismiss, the motion for sanctions is without merit and must be denied.

wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, preamble. Thus, the primary purpose of the Hague Convention is "to preserve the status quo" with respect to child custody and to deter feuding parents from "crossing international boundaries in search of a more sympathetic [custody] court." *Miller v Miller*, 240 F. 3d 392, 398 (4th Cir. 2001). The scope of a court's inquiry under the Hague Convention is limited to the merits of the claim for wrongful removal or retention. *See* 42 U.S.C. §11601(b)(4); Hague Convention, art. 16. Accordingly, the merits of any underlying custody case are not at issue. *See Miller*240 F. 3d at 398; Hague Convention, art. 19[16].

ICARA, enacted in 1988, established procedures for the implementation of the Hague Convention in the United States. In this regard, it defined and allocated the burdens of proof for various claims and defenses under the Hague Convention. *See* 42 U.S.C. § 11601 *et seq.*[17] Specifically, ICARA requires that a petitioner under the Hague Convention establish, by a preponderance of the evidence, that the child whose return is sought has been "wrongfully removed or retained within the

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16

Although some of the defenses to the return of a child under the Hague Convention raise issues that may mirror those in a custody dispute, *see e.g.*, Hague Convention, art. 13(b) (a court is not bound to order return if it would expose the child to grave risk of physical or psychological harm), the purpose of the Hague Convention proceeding is not to determine the best interests of the child, as is true in a custody dispute. *See infra* notes 30, 31, & 36 and accompanying text.

17

Cases brought pursuant to ICARA and the Hague Convention are tried to a judge, as neither ICARA nor the Hague Convention provides for trial by jury and the available remedy—return of the child—is equitable in nature. *See Silverman v. Silverman*, 2002 WL 264932 (D. Minn. Feb 21, 2002).

meaning of the Convention." 42 U.S.C. § 1 1603(e)(l)(A). Thus, in this matter, Hazbun must prove by a preponderance of the evidence (i) that her child was habitually resident in Colombia at the time Rodriguez retained the child in the United States; (ii) that the retention was in breach of Hazbun's custody rights under Colombian law, and (iii) that she had been exercising those custody rights at the time of retention. *See Miller,* 240 F.3d at 398; Hague Convention, art. 3.

A respondent opposing the return of a child may prevail if he or she establishes certain defenses designated by ICARA and available under the Convention.[18] Thus, Rodriguez might prevail in this matter if he establishes by clear and convincing evidence (i) that there is a grave risk that returning the child to Hazbun in Colombia would expose the child to physical or psychological harm or otherwise place him in an intolerable situation[19], or (ii) that the return of the child to Colombia would not be permitted by the fundamental principles of the United States "relating to the protection of human rights and fundamental freedoms."[20] Rodriguez also might prevail if he establishes by a preponderance of the evidence that Hazbun "was not actually exercising the custody rights at the time of. retention,"[21] or if it is shown that

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[18]*See* 42 U.S.C. § 1 1603(e)(2)(A) (requiring proof, by clear and convincing evidence, that one of the exceptions set forth in article 13b or 20 of the Hague Convention applies); 42 U.S.C. § 11603(e)(2)(B) (requiring proof, by a preponderance of the evidence, that some other exception set forth in article 12 or 13 of the Hague Convention applies).

[19]Hague Convention, art. 13b.

[20]Hague Convention, art. 20.

[21]Hague Convention, art. 13a.

degree of maturity at which degree of maturity at which it is appropriate to take account of views."[22]

There is an important distinction, often overlooked, between a Hague Convention petition brought pursuant to ICARA and a petition to determine the legal custody of a minor. To be sure, a Hague Convention petition affects custody, but it is not a custody determination. *See* Hague Convention, art. 19. And significantly, the Hague Convention, which is the "Law of the Land,"[23] specifically directs that courts "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention." Hague Convention, art.16. The intention and effect of the Hague Convention, then, is to "lend priority to the custody determination hailing from the child's state of habitual residence." *Miller*, 240 F.3d at 399. Thus, a state court of competent jurisdiction may proceed to determine legal custody only where that court or a federal district court first finds that the petitioner cannot prove wrongful removal or retention or where the respondent establishes one of the available affirmative defenses.

III.

The first two grounds cited in Rodriguez's motion to dismiss, namely lack of subject matter jurisdiction and failure to join a necessary and indispensable party, are without merit. With respect to the first ground, Rodriguez confuses jurisdiction with

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22 Hague Convention, art. 13, ¶ 2.

23 U.S. Const. art VI, cl. 2 ("This Constitution,. . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.")

the merits of the petition for the child's return: Each of his arguments goes to the merits of the Hague Convention petition rather than to the issue of jurisdiction. With respect to the second ground, it is clear from the Hague Convention and ICARA that the child whose return is sought is not a necessary party to the judicial proceedings.

A. Subject Matter Jurisdiction

Rodriguez makes six contentions in support of his argument that this Court lacks subject matter jurisdiction to decide the Hague Convention petition. Each of the first five contentions[24] relates to an element of proof required either of the petitioner who seeks a child's return or of the respondent who opposes that return. Each contention will, at the proper time, be the subject of fact finding in determining the merits of the petition, but none relates to the Court's power to adjudicate the merits.

The sixth contention—that the Court lacks authority to

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[24]Rodriguez's first five contentions are:

1. that the "habitual residence" of the child is the Commonwealth of Virginia, not Colombia, *see* 42 U.S.C. § 11603(e)(1)(A); Hague Convention, art. 3a;
2. that Hazbun was not actually exercising the custody rights under the custody agreement, *see* Hague Convention, art. 1 3a;
3. that the child would be in grave risk of physical harm if returned to Colombia, *see* Hague Convention, art. 13b;
4. that the Court should respect the wishes of the child that he not be returned in light of his age and maturity, *see* Hague Convention, art. 13, ¶2; and
5. that the return of the child would not be permitted by the fundamental principles of the United States relating to the protection of human rights and fundamental freedoms, *see* Hague Convention, art. 20.

order the return of the child unless the requirements of Virginia domestic relations law have been satisfied—is based on a mistaken interpretation of § 11604 of ICARA[25]. That section is concerned with provisional remedies "to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition." 42 U.S.C. § 11604(a). The requirement in § 11604(b) that the strictures of state law must be satisfied before ordering the removal of a child from a person having physical control of the child relates only to *provisional* measures that a court may take, not to the final disposition of the petition. Simply put, § 11604 establishes a prerequisite for certain provisional remedies; it does not address jurisdiction to adjudicate a Hague Convention petition. Instead, ICARA explicitly provides that United States district courts and the courts of the states "shall have concurrent original jurisdiction of actions arising under the ague] Convention." 42 U.S.C. § 11603(a). A petition for return of a child is properly heard by "any court which has jurisdiction. . . in the place where the child is located at the time the petition is filed." *Id.* § 11603(b). Given that the child was residing within this division at the time the petition was filed, subject matter

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See 42 U.S.C. § 11604, which reads in relevant part:

(a) Authority of courts

[A]ny court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

jurisdiction exists here.[26]

B. Indispensable Party

Whether a party is indispensable requires a two-step inquiry. *See* Rule 19, Fed.R.Civ.P.; *Owens-Illinois Inc. v. Meade*, 186 F.3d *435*, 440 (4th Cir. 1999). First, it must be determined whether a party is "necessary" pursuant to Rule 19(a). *See Owens-Illinois*, 186 F.3d at 440. And second, if a necessary party cannot be joined for some reason, it must be determined whether the party is "indispensable" to the case, in that the party's appearance is so essential that the case must be dismissed. *Id.*

A party is necessary under Rule 19(a) if the party's presence is needed to afford "complete relief to those already parties." Rule 19(a)(1). Given this, it is clear that joinder is inapplicable here because complete relief can be afforded among those persons already parties to the suit. This is so because a Hague Convention petition brought pursuant to ICARA concerns only the rights of those claiming custody of a child,[27] in this case Hazbun and Rodriguez. Any relief ordered here under the Hague Convention and ICARA will be directed solely to Hazbun or Rodriguez, not to Isidoro. Thus, if Hazbun prevails on her petition, Rodriguez will be ordered to return Isidoro to Hazbun in Colombia, whereas if Rodriguiez prevails, he will not be ordered to return Isidoro to Colombia and he will then have an opportunity to pursue his change of custody remedy in an appropriate state

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[26]Rodriguez mistakenly relies on *Miller* in support of his jurisdictional argument. There, the Fourth Circuit affirmed a district court's exercise of jurisdiction to order the return of a child to Canada pursuant to a Hague Convention petition. *Miller*, 240 F.3d at 403. *Miller* provides no support for Rodriguez's position.

[27]*See* 42 U.S.C. §~ 11601—11604; Hague Convention, *passim*.

court. Of course, this does not mean that a child who is the object of a Hague Convention and ICARA suit has no role to play in that suit. In appropriate circumstances, the rights and wishes of the child may be considered during the proceeding,[28] but it does not follow that the child is a necessary party to the proceeding. Accordingly, Rodriguez's motion to dismiss on this ground must fail.

IV.

Rodriguez's request for dismissal based on abstention meets the same fate. Federal courts have a "virtually unflagging obligation. . . to exercise the jurisdiction given to them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Yet, the Supreme Court has fashioned a number of abstention doctrines based upon the federal courts' prerogative to withhold equitable or quasi-equitable forms of relief, such as the relief sought here. The legal principles governing these abstention doctrines are well settled and "begin with the fundamental proposition that 'abstention from the exercise of federal jurisdiction is the exception, not the rule." *Richmond, Fredericksburg & Potomac RR Co. v. Forst*, 4 F.3d 244, 251 (4th Cir. 1993) (quoting *Colorado River*, 424 U.S. at 813). Of the various abstention doctrines, two are relevant here: *Younger* abstention and *Colorado River* abstention.

A. Younger *Abstention*

The *Younger* abstention doctrine is designed to preserve comity between the national government and the states by precluding federal court proceedings when the federal claims "have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Cinema Blue of Charlotte*

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[28] *See* 42 U.S.C. § 11603; Hague Convention, arts. 13, 20,

v. Gilchrist, 887 F.2d 49, 52 (4th Cir. 1989). Accordingly, the exercise of *Younger* abstention is appropriate only where three conditions are met: (i) where there is an ongoing state judicial proceeding, (ii) where the proceeding implicates important state interests, and (iii) where there is an adequate opportunity to present the federal claims in the state proceeding. *Employers Res. Mgmt. Co. v. Am. Employers Benefit Trust, 65* F.3d 1126, 1134 (4th Cir. 1995). A state interest is important for purposes of the second *Younger* abstention factor where "exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987).

The first requirement for *Younger* abstention appears to be satisfied here as there is an ongoing state judicial proceeding—the child's custody petition pending in Fairfax County Juvenile and Domestic Relations Court—in which the federal claim under ICARA and the Hague Convention could be raised. Although the Hague Convention claim has not been formally asserted in the state court petition, this is not conclusive because it matters only whether the claim *"could be raised"* in the state proceeding. *See Cinema Blue*, 887 F.2d at 52 (emphasis added). And in this respect, it appears the Hague Convention claim *could* be raised in that court given that state courts have original jurisdiction (concurrently with federal courts) over claims brought under ICARA and the Hague Convention. *See* 42 U.S.C. § 11603(a)[29].

The other two *Younger* factors, however, counsel against abstention in this case. First, there is substantial doubt that

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[29]Juvenile and Domestic Relations courts in Virginia have jurisdiction over matters involving "control or disposition" of a child where custody or visitation is in controversy, *see* Va. Code § 16.1-241, which would arguably encompass a Hague Convention petition.

Hazbun will have an adequate opportunity to raise her Hague Convention claim in the state proceeding, as the claim currently is not formally before the state court and the proceedings currently scheduled in that court concern only the merits of the state custody dispute. More significantly, the *Younger* requirement that the federal proceeding implicates important state interests is plainly not met here and abstention should fail on that basis alone. Although a state has a manifest interest in the outcome of a child custody dispute adjudicated in its courts,[30] the resolution of a custody dispute is not at issue in a Hague Convention petition. Rather, such a petition addresses only the propriety of the removal or retention of a child across national boundaries, and thus implicates an important *federal* interest in foreign relations and the enforcement of United States treaty obligations. Deference to a state court's interest in a custody dispute is especially problematic in the context of a Hague Convention claim because ICARA and the Convention explicitly "divest[] the state of jurisdiction over. . . custody issues until the merits of the Hague Convention claim have been resolved."[31] To address the custody dispute before the Hague Convention petition is resolved would violate the direction of the Hague Convention that courts "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention." Hague Convention, art. 16. Accordingly, the state court's interest in the custody matter does not arise until the Hague Convention and ICARA issues have been decided. It follows that no substantial comity concerns exist in the instant circumstances and *Younger* abstention is not warranted.

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30 *See Moore v. Sims*, 442 U.S. 415, 435 (1979) (recognizing that family relations are a traditional area of state concern).

31 *Grieve v. Tamerin*, 269 F.3d 149, *153* (2d Cir. 2001) (citing 42 U.S.C. § 1 1601(b)(4)); Hague Convention, art. 16; *see also Miller*, 240 F.3d at 398.

Federal courts of appeals addressing this issue have reached the same result[32]. District court results, however, are not uniform.[33] But those reaching a contrary result are either distinguishable on their facts or unpersuasive on their reasoning.[34]

In the end, while there is little doubt that the state court would be a competent forum in which to raise the Hague Convention claims, those claims are now properly before this Court and the state's substantial interest in the custody dispute is

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[32]See *Grieve*, 269 F.3d at *153* (state interests in custody issues do not raise substantial comity concerns that require *Younger* abstention); *Silverman v. Silverman*, 267 F.3d 788, 792 (8th Cir. 2001) ("abstention principles do not permit an outright dismissal of a Hague petition").

[33]*See, e.g., Friedrich v. Thompson*, No. 99CV00772, 1999 U.S. Dist. LEXIS 21305 at *8_*10 (M.D.N.C. Nov. Nov. 26, 1999) (finding no basis for abstention). *But see Cent v. Cent*, Civ. No. 0 1-00826 BMK, 2002 WL 340835 (D. Haw. Feb. 8, 2002) (abstaining under *Younger* and *Colorado River); Bouvagnet v. Bouvagnet*, No. 01 C *4685*, 2001 WL 1263497 (ND. Ill. Oct. 22, 2001) (abstaining under *Younger); Grieve v. Tamerin*, No. 00-CV-3824 JG, 2000 WL 1240199 (E.D.N.Y. Aug. *25*, 2000) (abstaining under *Younger), aff'd on other grounds, Grieve*, 269 F.3d 149 (2d Cir. 2001).

[34]*Cerit* is distinguishable because the Hague Convention issue there had been squarely presented and substantially argued in the state court proceeding. The federal district court found that the petitioner had selected the state court as the forum for bringing his Hague Convention petition. *See Cent*, 2002 WL 340835 at *3_*4, *~*7• To the extent that the district courts in *Cent, Btuvagnet* and *Grieve* found that an important state interest was implicated in a Hague Convention petition because of the state's concern with domestic relations, they inappropriately disregarded ICARA's and the Hague Convention's mandate that a decision on the Hague Convention petition be rendered prior to and without regard to the merits of any underlying child custody claims. *See* 42 U.S.C. § 1160 1(b)(4); Hague Convention, art. 16; *Grieve*, 269 F.3d at 153.

a question that must await resolution of the Hague Convention claim before it can properly be addressed.

B. Colorado River Abstention

The *Colorado River* abstention doctrine allows a district court to abstain from adjudicating a controversy before it in favor of parallel state proceedings only under "exceptional" circumstances "for reasons of wise judicial administration." *Colorado River*, 424 U.S. at 817—18. Before determining that abstention is warranted, a district court must first determine whether the state and federal proceedings are parallel. *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1073 (4th Cir. 1991). Suits are considered parallel if "substantially the same parties litigate substantially the same issues in different forums." *Id.* This suit and the suit in Fairfax County Juvenile and Domestic Relations Court do not qualify as parallel proceedings in either respect; neither the parties nor the issues are substantially the same. Because the child, not the father, is the petitioner in the state court suit, the father is not a party to that suit. This is significant because Hague Convention relief in this case will be directed to the parents, not the child. Further, because this suit concerns *only* ICARA and the Hague Convention, but not the underlying custody dispute, the issues in the two suits are not substantially the same. Accordingly, the threshold test for the exercise of *Colorado River* abstention—the existence of parallel proceedings—is not met here.

Assuming, *arguendo*, the contrary, *Colorado River* abstention would nonetheless be unwarranted here. Even where state and federal proceedings are parallel, a court must consider and balance several factors to determine whether it is proper to abstain. The factors include (i) the assumption by either court of jurisdiction over property; (ii) the inconvenience of the federal forum; (iii) the desire to avoid piecemeal litigation; (iv) the order in which jurisdiction was obtained; and (v) the source of

applicable law. *New Beckley,* 946 F.2d at 1073—74 (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, *15—16* (1983); *Colorado River,* 424 U.S. at 818). If the balance of factors weighs against abstention, the federal suit should proceed despite the existence of parallel proceedings.[35]

The first factor is irrelevant, as there is no property over which to assume jurisdiction. The second factor, the convenience or inconvenience of the federal forum, is neutral, as the federal and state courts are in close geographic proximity and both are equally distant and inconvenient for Hazbun. *The third* factor, the desire to *avoid* piecemeal *litigation, does* not arise because the issues in the two proceedings are not congruent.[36] The fourth factor, the order in which jurisdiction was obtained, favors the federal forum as the Hague Convention question is not before the state court. Finally, the fifth factor, the source of applicable law, clearly counsels against finding the exceptional circumstances that warrant abstention. The presence of federal questions weighs heavily against abstention[37], and the source of applicable law here is solely federal. Thus, the balancing of factors counsels

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[35]*See Lops v. Lops,* 140 F.3d 927 (11th Cir. 1998) (finding no basis for *Colorado River* abstention in a Hague Convention proceeding after weighing the factors, despite the existence of parallel proceedings).

[36]Courts determining custody in Virginia "give primary consideration to the best interests of the child." Va. Code § 20-124.2; *see also Farley v. Farley,* 387 S.E.2d 794 (Va. Ct. App.,1990). By comparison, the success of a Hague Convention petition turns primarily on other factors, including the child's habitual residence and the exercise of custody rights. *See* Hague Convention, arts. 3, 13.

[37]*See Moses H. Cone,* 460 U.S. at 26 ("[T]he presence of federal law issues must always be a major consideration weighing against surrender."); *Colorado River,* 424 U.S. at 815 n.21 ([T]he presence of a federal basis for jurisdiction may ra[illegible] the level of justification needed for abstention.").

compellingly against the exercise of *Colorado River* abstention.[38]

The general principles expressed in the preamble of the Hague Convention also weigh against abstention here. Given the primary purpose of the Hague Convention "to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic [custody] court," *Miller*, 240 F. 3d at 398, the forum choice of the party seeking the return of a child under the Convention deserves considerable deference. In sum, abstention in this action under either the *Younger* or *Colorado River* abstention doctrines is inappropriate.

V.

In accordance with these principles, Rodriguez's motion to dismiss the petition must be denied. An appropriate Order has issued.

Alexandria, Virginia
March 21, 2002

/S/
T.S. Ellis, III
United States District Judge

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[38] This case is readily distinguishable from *Copeland v. Copeland*, 1998 WL 45445 (4th Cir. Feb. 6, 1998) (unpublished disposition), in which the Fourth Circuit affirmed a district court's discretionary exercise of *Colorado River* abstention in a Hague Convention suit. There, the state trial court had issued a final ruling denying the Hague Convention petition. Rather than appeal the state court ruling on the Hague Convention issue, the petitioner filed suit in federal district court, seeking to revive her ICARA and Hague Convention claims. In those circumstances, which differ sharply from those at bar, abstention would serve the interests of judicial economy.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

AMALIN HAZBUN ESCAF,	)
	)
Petitioner,	)
	)
v.	)Civil Action
	)No. 01-1926-A
	)(200 F. Supp 2d 603
	) E.D. Va 2002)
ISIDORO RODRIQUEZ,	)
	)
Respondent.	)

FINAL JUDGMENT

The matter came before the Court for a bench trial on petitioner's complaint seeking the return of her son to Colombia, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction[1] and the International Child Abduction Remedies Act[2]. After reviewing the testimonial and documentary evidence adduced by the parties, the Court issued findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P. Based on those findings of fact and conclusions of law,

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[1]Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 1988 WL 411501 (entered into force Dec. 1, 1983; for the United States July 1, 1988; for Colombia March 1, 1996; between Colombia and the United States June 1, 1996).

[2]42 U.S.C. § 11601 *et seq.* The statute implements the Hague Convention in the United States and specifically states that its provisions "are in addition to and not in lieu of the provisions of the Convention." 42 U.S.C. § 11601(b)(2).

It is **ORDERED** that **JUDGMENT** be, and hereby is, entered in favor of petitioner and that the child, Isidoro Rodriguez Hazbun, be promptly returned to the custody of his mother in Barranquilla, Colombia.

It is further **ORDERED**, for the reasons stated from the bench, that respondent's motion for a stay pending appeal pursuant to Rule 62, Fed. R. Civ. P., is **GRANTED IN PART** and **DENIED IN PART**. It is granted insofar as this matter is stayed for the limited purpose of allowing respondent to seek a stay pending appeal from the Court of Appeals for the Fourth Circuit on an expedited basis. This stay is to remain in effect only until the Court of Appeals has ruled on respondent's expedited motion for a stay pending appeal. Respondent's motion for a stay is denied in all other respects.

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
May 6, 2002

/s/
T.S. Ellis, III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

AMALIN HAZBUN ESCAF,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 01-1926-A
	)	
ISIDORO RODRIQUEZ[1],	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Petitioner brought this action under the Hague Convention on the Civil Aspects of International Child Abduction[2] (Hague Convention) and the International Child Abduction Remedies Act[3]

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[1]The caption of the complaint lists respondent's name as "Rodriquez" with a "q" but all other pleadings spell the name "Rodriguez" with a "g". The more common "Rodriguez" spelling will be used here in all instances except in the caption.

[2]Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 1988 WL 411501 (entered into force Dec. 1, 1983; for the United States July 1, 1988; for Colombia March 1, 1996; between Colombia and the United States June 1, 1996).

[3]42 U.S.C. § 11601 *et seq.* The statute implements the Hague Convention in the United States and specifically states that its provisions "are in addition to and not in lieu of the provisions of the Convention." 42 U.S.C. § I 1601(b)(2).

(ICARA) to secure the return of her son to Colombia from the keep of respondent, the child's father. Respondent moved to dismiss the petition (i) for lack of subject matter jurisdiction, pursuant to Rule 12(b)(l), Fed. R. Civ. P., (ii) for failure to join the child as an indispensable party, pursuant to Rules 12(b)(7) and 19, Fed. R. Civ. P., and (iii) for abstention pursuant to *Younger v. Harris,* 401 U.S. 37 (1971). The motion to dismiss was denied[4] and the matter set for a prompt trial.[5]

A bench trial was held on April 25 and May 1, 2002. Petitioner presented the testimony of one witness: Amalin Hazbun Escaf. Respondent presented the testimony of five witnesses: (1) Timothy Moore, chief executive officer of SOCOCO Construction who has lived in Colombia for approximately thirty-five years; (2) Derek Steele, teacher and counselor at Mark Twain Middle School; (3) Montgomery Blair Sibley, general manager of Alodus Corporation; (4) Irene Rodriguez, respondent's wife, who is a licensed Colombian attorney and who is employed as respondent's legal assistant; and (5) Isidoro Rodriguez Hazbun, the child whose return is being sought under the Convention.[6]

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[4] *See Hazbun Escafv. Rodriquez,* Civil No. 01-1926-A (E.D. Va. Mar. 19, 2002) (order); *Hazbun Escaf v. Rodriquez,* 191 F. Supp. 2d 685 (E.D. Va. 2002) (memorandum opinion).

[5] The Convention requires that judicial authorities "act expeditiously in proceedings for the return of children." Hague Convention art. 11.

[6] Isidoro, who celebrated his thirteenth birthday on March 10, 2002, was called to testify in this matter by his father, the respondent. To minimize any intimidation Isidoro might feel as a result of testifying in open court and to facilitate the Court's assessment of his maturity level, Isidoro's testimony was taken in chambers, on the record, with the parties and counsel present. In this environment, the Court interviewed Isidoro, asking him a number of questions about his life in Colombia and Virginia, as well

Also admitted into evidence were approximately thirty exhibits. The following findings of fact and conclusions of law are issued pursuant to Rule 52, Fed. R. Civ. P.

FINDINGS OF FACT

1. Petitioner Amalin Hazbun Escaf(Hazbun) is a citizen of Colombia currently residing in Barranquilla, Colombia and employed as an optometrist.

2. Respondent Isidoro Rodriguez (Rodriguez) is a U.S. citizen currently residing in Fairfax County, Virginia. He is a member of the Virginia Bar and appears *pro per* in this matter.

3. Hazbun and Rodriguez were married in Colombia on August 6, 1988. They had a child, Isidoro Rodriguez Hazbun (Isidoro), on March 10, 1989. Isidoro was born in Barranquilla, Colombia, but is also a United States citizen by virtue of his father's citizenship. The family, including two of Hazbun's children from a previous marriage, lived together in Barranquilla for approximately seven years until 1996.

4. In the fall of 1996 Hazbun and Rodriguez separated, and in the spring of 1997 they divorced. Rodriguez continued to reside in Barranquilla until January 2000, when he came to reside full-time in Virginia. During the period of the separation and continuing through the time of the divorce, Isidoro resided with Hazbun in Barranquilla.

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as his concerns and preferences. Following this, the parties were given an opportunity to askIsidoro questions.

5. Rodriguez alleges that, coinciding with the separation, he and Hazbun arrived at a verbal agreement that they would share custody of their son such that Isidoro would divide his time equally between his parents. Hazbun testified, however, that there was no such agreement. There is no record evidence of the alleged agreement, and no court ever recognized this alleged agreement.

6. Then, in August 1997, the First Family Court of Barranquilla, Colombia approved a different custody agreement entered into by Hazbun and Rodriguez providing that Isidoro would reside with, and be primarily in the care of Hazbun, but would spend every other weekend with Rodriguez[7]. Pursuant to this court-approved custody agreement, the summer holidays were to be divided evenly with Isidoro spending equal time with each parent. The agreement also provided that both parents were to share the right and the responsibility for the education and the moral and intellectual upbringing of their child. In this regard, Rodriguez was to retain certain responsibilities for taking Isidoro to evening sports practices and academic lessons. In a second judicial order, the Barranquilla Family Court clarified that Hazbun retained formal custody of Isidoro.[8] The record reflects that both Hazbun and Rodriguez exercised their respective rights under the court-approved custody agreement.

7. Following the divorce, Isidoro continued to live with his mother in Barranquilla, where he continued as a student

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[7] *See Amalin Hazbun Escaf v. Isidoro Rodriguez Cruz* (First Family Court, Barranquilla, Colombia Aug. 1, 1997).

[8] *See Amalin Hazbun Escaf v. Isidoro Rodriguez Cruz*, Ref. No. 23.833 (First Family Court, Barranquilla, Colombia Aug. 26, 1997).

in good standing at Marymount School, a private, bilingual, Catholic school.[9] It is undisputed, and the record convincingly reflects that from birth to age twelve, Isidoro lived a full life as a young child growing up in Barranquilla; he participated in sports, had many friends, and maintained an active family and social life.

8. After Rodriguez moved to Virginia, Hazbun and Rodriguez agreed to have Isidoro travel to the United States to visit his father on three separate occasions. For Isidoro to travel outside Colombia, his parents had to provide Colombian authorities with notarized exit authority specifying Isidoro's departure and return dates. The first two visits were without incident: Isidoro visited his father in the United States during the summer of 2000 for one month and then again during Christmas vacation in 2000 for approximately two weeks. Isidoro's third trip to the United States was scheduled to commence on June 7, 2001 and conclude on July 14, 2001. Pursuant to the requisite notarized exit authority provided by Hazbun and Rodriguez, Isidoro traveled to the United States on June 7, 2001, using a ticket paid for by his father.

9. On July 13, 2001, one day before Isidoro's scheduled return to Colombia, Rodriguez sent a facsimile transmission to Hazbun in Colombia informing her that Isidoro would be remaining in the United States and would not be returning to Colombia as planned. Also included in the transmission were (i) a letter from Isidoro to his mother informing her that he wanted to stay with his

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[9]The record reflects that Isidoro's place at Marymount School has been reserved in his absence.

father,[10] and (ii) a copy of a petition for change of custody filed by Rodriguez in Isidoro's name in Fairfax County Juvenile and Domestic Relations Court.[11]

10. Consistent with the facsimile notice received by Hazbun, Isidoro did not return to Colombia. Instead, Isidoro has remained continuously in Virginia with his father since

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10 The Spanish original and an English translation of the July 13, 2001 letter were admitted into evidence. The translation of the letter admitted into evidence reads as follows:

> Hello mommy how are you? I hope OK. I write you to tell you that I want to stay here. I tell you this now from here, because you know that if I [told] you there yoou would not let me come.
>
> Mommy, I love you much and you know that I am always going to love you and to be your son, but now I want to spend time with my dad. Here everything is organized and I like the school its name is "Mark Twain Middle School". Besides I will improve my English and things are not so unsafe as in Colombia, neither there is guerrilla. Besides I am growing into a man and let's accept you are not [a] man. There are things I need to learn from him. I do not want this to turn into a fight you know that I hate when you fight. I am happy here, as I was when with you, but it is that here there are more opportunities in the study; besides I am getting [ready] for college. I know you love me and want the best for me and that I be happy, well this makes me happy. I love you much and I will miss you but so i miss my dad. I love you much and chachi and Mayri and I am going to miss you. Please let's talk every day.
>
> Thanks a very big kiss
> Isi
>
> (Errors in original)

11 *Isidoro Rodriguez-Hazbun v. Amalin Hazbun Escaf*, case No. JJ-347-050-01-01 (Juv. & dom. Rel. Ct. of Fairfax Cty., filed July 13, 2001).

June 7, 2001. During this period, Isidoro, a seventh grader, has attended the Mark Twain Middle School in Fairfax County, Virginia, where he participates in sports, has made new friends, and maintains an active social life. He has also maintained telephone contact with his mother and family in Barranquilla.

11 In sum, the record reflects that until his failure to return to Colombia on July 14, 2001, Isidoro had lived his entire life in Barranquilla, Colombia, making only occasional trips abroad.

1. On August 15, 2001, Hazbun filed a Hague Convention Return Application with the Colombian Central Authority,[12] seeking the return of Isidoro to Colombia.

2. On December 20, 2001, Hazbun filed this suit against Rodriguez seeking the return of Isidoro to Colombia under ICARA and the Hague convention.

3. At trial, Hazbun offered her own testimony, which credibly and convincingly established those matters set forth in paragraphs 1 through 13 above.

4. At trial, Rodriguez offered various exhibits and the testimony of witnesses in an attempt to show (i) that Isidoro would be in danger in Colombia, (ii) that Colombia's courts are corrupt and failed to provide due process, and (iii) that Isidoro is mature and wishes to remain in the United States.

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[12]Each nation that is a party to the Convention is required to designate a Central Authority to discharge the duties created by the Convention. *See* Hague Convention art. 6.

5. With respect to conditions in Colombia, there is no persuasive evidence of a serious risk of physical or psychological harm to Isidoro if he is returned to Colombia. At best, the record reflects a general current risk of harm to U.S. citizens in Colombia, but no specific risk of harm either to Isidoro or, more generally, to children in Barranquilla, Colombia who are Colombian as well as American citizens. Thus, the record contains a travel warning issued by the U.S. Department of State on April 17, 2001 advising U.S. citizens against travel to Colombia. The travel warning advised that U.S. citizens in Colombia are the victims of threats, kidnappings, domestic airline hijackings, and murders and that threats targeting U.S. citizens are expected to continue and possibly increase in response to U.S. support for Colombian drug eradication programs. The State Department further warned that nearly 120 U.S. citizens have been kidnapped in Colombia over the past 20 years. No information is provided concerning the age of the kidnapping victims.

6. Timothy Moore, a U.S. citizen who has lived in Colombia for approximately thirty-five years also offered testimony concerning conditions in Colombia. Moore is the chief executive officer of a heavy construction and mining company that has operated in Colombia since 1948 and uses Barranquilla as its principal base for Colombian maintenance facilities. Moore testified that he recently moved from Colombia to Miami for security reasons and, although his company formerly maintained a guest facility in Barranquilla for its visiting executives, these executives now, and for the past twelve months, have stayed instead in Barranquilla's principal hotel for reasons of security. Moore stated he has received kidnapping threats against himself and other employees, and that American employees of his company have been kidnapped when

working on a railroad construction project in northeastern Colombia near the Venezuelan border, a distance of more than 200 kilometers from Barranquilla. Moore now visits Colombia only for business and is accompanied by four bodyguards if he leaves the immediate area of Barranquilla.

7. Montgomery Blair Sibley, an American lawyer admitted to practice in several jurisdictions, testified that he has traveled to I3arranquilla about six times since 1990. Sibley was last in Colombia four years ago, but is now reluctant to return for reasons of personal safety. Sibley has seen Isidoro approximately once a month since Isidoro has been in the United States.[13]

8. Irene Rodriguez, respondent's legal assistant and a licensed Colombian attorney, worked for twelve years in respondent's law office. She was married to respondent in November 2000 and now resides with him in Virginia. Although a Colombian citizen, she is afraid to return to Colombia because of the situation there. She testified that, in 1997, Rodriguez was harassed by Colombian security officials and his office in Barranquilla was robbed. She further testified that, in February 2000, Rodriguez was threatened with kidnapping. Specifically, Irene Rodriguez testified that a notice posted on the outside door of Rodriguez's home in the Santa Veronica neighborhood of Barranquilla included a "kidnapping list" that named several persons. Rodriguez was not mentioned by name, but "the gringo" was mentioned on the list, which Irene

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[13]During these visits, Blair, it appears, had several conversations with Isidoro concerning Isidoro's wishes regarding returning to Colombia. Rodriguez was not permitted to elicit Blair's hearsay testimony concerning Isidoro's statements to him. *See* Rule 803, Fed. R. Evid.

Rodriguez and Rodriguez took to be a reference to Rodriguez.

9. Rodriguez genuinely fears for Isidoro's safety if Isidoro is returned to Colombia, partly because Rodriguez fears that his enemies might attempt to get to him through his son. Yet this fear has no persuasive record support. No threat has ever been directed to Isidoro and indeed, he lived in Barranquilla without incident for one and a half years after the threat Rodriguez believed was directed to him.[14] Moreover, Hazbun testified credibly that she is confident of her son's safety in Barranquilla. In this respect, she points out that Isidoro has many cousins and friends his age in Barranquilla, and there is no evidence that any of them have been threatened or harmed because of the political situation in Colombia.

10. At most, then, the evidence establishes (i) that Colombia may be a dangerous place for some American businessmen and (ii) that there has been a threat to Rodriguez in Barranquilla. There is no persuasive evidence specifically establishing a risk to Isidoro of kidnapping or violence in Barranquilla.[15]

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14 Furthermore, Isidoro did not live at the residence in Barranquilla where the kidnapping threat was posted, as he had resided with his mother since the 1996 separation.

15 An excluded exhibit (hearsay) indicates that in January 2002 there were 27 kidnappings of minors in Colombia as a whole, but this data was not broken down by geographic area, nor were the victims' nationalities specified. This exhibit separately reported that in January 2002 there was one kidnapping in the Colombian Province that includes the city of Barranquilla, but the victim's age and nationality were not specified. To put these figures in the proper perspective it is useful to note that Barranquilla is the fourth largest city in Colombia with a population of 1.3 million persons and that Colombia's total population is 43 million. Given this and

11. With respect to alleged corruption and lack of due process in the Barranquilla Family Court, the record contains documentary evidence of two petitions filed by Hazbun in Colombian Family Court for (i) an order increasing the monthly food allowance paid by Rodriguez to Hazbun for the maintenance of Isidoro, and (ii) an order requiring Rodriguez to pay past-due installments.

These petitions were apparently filed and ruled upon without providing Rodriguez with notice or opportunity for a hearing.[16]

12. With respect to Isidoro's maturity and adjustment to life in the United States, Rodriguez presented the testimony of Derek Steele, who is Isidoro's math teacher at Mark Twain Middle School. Steele testified that Isidoro is a bright young man who is different from the other boys his age in that he does not misbehave when the teacher leaves the classroom.

13. Finally, Rodriguez presented the testimony of Isidoro to establish the child's maturity and his desire to remain in the United States. In this regard, (i) Isidoro stated that he enjoyed his life in Barranquilla, but says he now prefers to stay in the United States so that he can live with his father for the time being. He indicated that he would

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given the lack of specificity, this exhibit, even assuming its admissibility, does not persuasively establish a serious risk of harm to Isidoro in Barranquilla.

[16]The petitions were dated July 2000 and April 2001, and the Family Court's order was issued April 25, 2001. All of this occurred after the August 1997 entry of the Barranquilla Family Court order approving the parties' custody agreement, as to which there is no allegation of lack of notice or opportunity to be heard.

prefer to spend alternate years with each of his parents. (ii) He also mentioned better job and educational opportunities as other reasons for staying in the United States. (iii) Finally, Isidoro indicated that he is concerned about violence in Colombia, although he has not received any personal threats and does not seem to fear for his own safety in Colombia. Isidoro testified that he has maintained regular contact with his mother and other friends and family in Colombia during his ten months in the United States.

14. It is apparent from his demeanor, his manner, and the nature of his testimony that Isidoro is a normal thirteen-year-old boy whose English is quite good, although not as good as his Spanish, which, for the first twelve years of his life, was his principal language. Isidoro exhibits a level of maturity commensurate with, but no greater than, the level of maturity reasonably expected of a typical boy his age. Thus, although his stated wish to remain with his father in the United States for the time being appears genuine,[17] his observations concerning jobs and opportunities in this country and the dangers in Colombia appear clearly to be the product of suggestion by others.

CONCLUSIONS OF LAW

1 Hazbun filed this action pursuant to the Hague Convention[18], as implemented in the United States by

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17 *See supra* ¶ 24.

18 T.I.A.S. No. 11670

ICARA.[19] The Hague Convention establishes legal rights and procedures for the prompt return of children who have been "wrongfully removed to or retained in" a nation that is a party to the Convention. Hague Convention, art.1; 42 U.S.C. 11601(a). Through the adoption of the Convention, the signatory nations, including Colombia and the United States, sought "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, preamble. Thus, the primary purpose of the Convention is "to preserve the status quo" with respect to child custody and to deter feuding parents from "crossing international boundaries in search of a more sympathetic [custody] court." *Miller v. Miller*, 240 F. 3d 392, 398 (4th Cir. 2001).

2 The scope of a court's inquiry under the Convention is limited to the merits of the claim for wrongful removal or retention. *See* 42 U.S.C. §11601(b)(4); Hague Convention, art. 16. Accordingly, the merits of any underlying custody case are not at issue. *See Miller*, 240 F. 3d at 398; Hague Convention, art. 19.[20] Put differently, the focus of a court's inquiry in a Hague Convention case is not "the best interests of the child," as

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[19]42 U.S.C. §11601 *et seq.*

[20]Although some of the defenses to the return of a child under the Convention raise issues that may mirror those in a custody dispute, *see, e.g.*, Hague Convention, art. 13(b)(a court is not bound to order return if it would expose the child to grave risk of physical or psychological harm), the purpose of the Hague Convention proceeding is not to determine the best interests of the child, as is true in a custody dispute.

it typically is in a state custody case; rather it is the specific claims and defenses under the Convention, namely whether a child has been wrongfully removed to, or retained in, a country different from the child's habitual residence and, if so, whether any of the Convention's defenses apply to bar the child's return to his habitual residence.

3 ICARA, enacted in 1988, established procedures for the implementation of the Hague Convention in the United States. In this regard, it defined and allocated the burdens of proof for various claims and defenses under the Convention. *See* 42 U.S.C. § 11601 *et seq.*[21] Specifically, ICARA requires that a petitioner under the Hague Convention establish, by a preponderance of the evidence, that the child whose return is sought has been "wrongfully removed or retained within the meaning of the Convention." 42 U.S.C. § 1 1603(e)(1)(A). And, in this respect, the Convention reflects "a strong presumption favoring return of a wrongfully removed child." *Danaipour v. McLarey,* 286 F.3d 1, 13 (1st Cir. 2002). If a petitioner establishes by a preponderance of the evidence that a respondent's retention of a child was wrongful within the meaning of the Convention, the child's return is required unless the respondent can establish one of the Convention's five available defenses.[22]

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Cases brought pursuant to ICARA and the Hague Convention are tried to a judge, as neither ICARA nor the Hague Convention provides for trialby jury and the available remedy--return of the child--is equitable in nature. *See Silverman v. Silverman,* 2002 WL 264932 (D. Minn. Feb. 21, 2002).

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See 42 U.S.C. § 11603(e)(2)(A) (requiring proof, by clear and convincing evidence, that one of the defenses ,set forth in article 13b or 20

And significantly, these defenses to a child's return are to be construed narrowly.[23] Indeed, a court retains discretion to order a child's return even if one of the defenses is proven. *Miller,* 240 F.3d at 402 (citing Pub. Notice *957,* 51 Fed. Reg. 10,494, 10,509 (1986)).[24]

4. Thus, to establish in this matter that Isidoro was wrongfully retained in the United States, Hazbun must prove by a preponderance of the evidence (i) that Isidoro was habitually resident in Colombia at the time Rodriguez retained Isidoro in the United States; (ii) that the retention was in breach of Hazbun's custody rights under Colombian law; and (iii) that she had been exercising those custody rights at the time of retention, or would have been exercising them but for the retention. *See Miller,* 240 F.3d at 398; Hague Convention, art. 3. Hazbun has met her burden; the record convincingly confirms that Isidoro was wrongfully retained by Rodriguez within the meaning of the Convention.

5. Although the Convention does not define "habitual residence," the Fourth Circuit has determined that

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of the Hague Convention applies); 42 U.S.C. § 1 1603(e)(2)(B) (requiring proof, by a preponderance of the evidence, that some other defense set forth in article 12 or 13 of the Hague Convention applies).

[23]*See* 42 U.S.C. § 1 160 1(a)(4); *Miller,* 240 F.3d at 402; *Feder v. Evans-Feder,* 63 F.3d 217, 226 (3d Cir. 1995); *Rydder v. Rydder,* 49 F.3d 369 (8th Cir. 1995).

[24]*See also* Hague Convention, art. 13 ("the judicial. . . authority is not bound to order the return of the child if. . . ."); Hague Convention, art. 20 ("return of the child under the provisions of Article 12 *maybe refused* if. . . .").

> there is no real distinction between ordinary residence and habitual residence. . . . A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the . The court must look back in time, not forward.[25]

It is also clear that the parents' citizenship and residence and the child's citizenship are not determinative of the child's habitual residence.[26] The habitual-residence inquiry is fact-specific and should be made on a case-by-case basis. *See Miller,* 240 F.3d at 400. And importantly, a parent cannot create a new habitual residence by wrongfully retaining a child.[27] In cases where a child's initial translocation from an established habitual residence is clearly intended to be of a specific duration (such as a defined visit to see the father during summer vacation), courts have generally refused to find that the changed intentions of one parent can operate to alter the child's

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Miller, 240 F.3d at 400 (citing *Friedrich v. Friedrich,* 983 F.2d 1396, 1401 (6th Cir.1993) (hereinafter *Friedrich I*)).

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See Diorinou v. Mezitis, 237 F.3d 133 (2nd Cir. 2001) (finding that children were habitually resident in Greece where children were citizens of both the United States and Greece, the father was a U.S. citizen, and the mother was a Greek citizen); *March v. Levine,* 249 F.3d 462 (6th Cir. 2001) (finding that children were habitually resident in Mexico where the children, both United States citizens, had been living in Mexico with their American father for one year prior to being removed to the United States by their maternal grandparents).

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See Miller, 240 F.3d at 400; *Diorinou* 237 F.3d at 141-42.

habitual residence.[28]

6. In the instant case, the credible record evidence compels the conclusion that Isidoro was habitually resident in Colombia immediately prior to his retention in the United States. This follows chiefly from the undisputed fact that prior to remaining in the United States in July 2001, Isidoro had lived his entire life in Barranquilla, Colombia. From birth until his parents' separation and divorce, Isidoro lived with his parents in Barranquilla, Colombia. Following his parents' separation in 1996, Isidoro lived with his mother in Barranquilla, attended school there, and had (and continues to have) numerous friends and family in Barranquilla.

7. As the custody agreement approved by the Colombian Family Court gave formal custody to Hazbun, with only visitation rights for Rodriguez, it is clear by a preponderance of the evidence that Rodriguez's retention of Isidoro for the last nine to ten months is in violation of Hazbun's custody rights under Colombian law. In this respect, whether a parent was exercising lawful custody of a child at the time of retention must be determined under the law of the child's habitual residence. *Miller*, 240 F.3d at 402; *Friedrich I*, 983 F.2d at 1042. What it means for a parent to exercise custody rights should be construed liberally. As the Sixth Circuit noted,

> The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find 'exercise' whenever a parent with de jure custody rights keeps, or

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[28] *See Mozes v. Mozes*, 239 F.3d 1067, 1077 (9th Cir. 2001) (Kozinski, J.) (citing and interpreting cases).

seeks to keep, any sort of regular contact with his or her child.

Friedrich v. Friedrich, 78 F.3d 1060, 1065 (6th Cir. 1996) (hereinafter *Friedrich II)*. Thus, the Sixth Circuit concluded, a person with valid custody rights to a child under the law of the country of the child's habitual residence does not fail to exercise those custody rights under the Hague Convention "short of acts that constitute clear and unequivocal abandonment of the child." *Id.* Here, there is not a scintilla of evidence of such abandonment; to the contrary, the record clearly reflects that Hazbun was exercising her lawful custody rights immediately prior to Rodriguez's retention of Isidoro in the United States. She granted permission for Isidoro to *visit* his father in the United States for a brief period; she did not abandon her child, nor did she consent to his retention in the United States. Instead, she has promptly and steadfastly objected to the retention and vigorously pursued steps to compel the child's return to Colombia.

8. In sum, a preponderance of the record evidence convincingly establishes all three elements required under the Convention to prove that Isidoro was wrongfully retained in the United States. Because Rodriguez's retention of Isidoro in the United States was wrongful within the meaning of the Convention, Isidoro's return to Colombia is required under the Convention unless Rodriguez can establish one of the five available defenses.

9. To establish on the defenses, Rodriguez must prove

1. by clear and convincing evidence that there is a grave risk that returning Isidoro to Hazbun in Colombia would expose the child to physical or psychological harm or otherwise place him in an

intolerable situation;[29]

2. by clear and convincing evidence that the return of Isidoro to Colombia would not be permitted by the fundamental principles of the United States "relating to the protection of human rights and fundamental freedoms";[30]
3. by a preponderance of the evidence that Hazbun's action for return was not commenced within one year of the wrongful retention *and* that Isidoro is not well-settled in Virginia;[31]
4. by a preponderance of the evidence that Hazbun "was not actually exercising the custody rights at the time of. . . retention. . . or had consented to or subsequently acquiesced in the. . . retention";[32] or by a preponderance of the evidence that Isidoro "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of views."[33]

Rodriguez does not assert or rely on defenses (iii) and

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[29]42 U.S.C. § 1 1603(e)(2)(A); Hague Convention, art. 13b.

[30]42 U.S.C. § 1 1603(e)(2)(A); Hague Convention, art. 20.

[31]42 U.S.C. § 1 1603(e)(2)(B); Hague Convention art. 12.

[32]42 U.S.C. § 1 1603(e)(2)(B); Hague Convention, art. 13a.

[33]42 U.S.C. § 1 1603(e)(2)(B); Hague Convention, art. 13 ¶2.

(iv).[34] His contentions concerning the remaining defenses are separately addressed.

10. Courts examining the Article 13b exception for grave risk of harm to the child generally look to the risk of physical or psychological harm that might be inflicted on the child by the person to whose custody the child would be returning.[35] This provision of the Convention "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests." *Friedrich II*, 78 F.3d at 1068. Accordingly,

> [o]nly evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.

Id. No such showing has been made in this case.

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[34] The Article 12 exception is inapplicable. Hazbun's Hague Convention petition and this suit were filed well within one year of the wrongful retention. And, with respect to the Article 1 3a exception, there is no contention that Hazbun was not exercising her custody rights under the court-approved custody agreement.

[35] *See, e.g., Miller*, 240 F.3d at 402 (finding no evidence that the mother would pose a danger to her children); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995) (finding that allegations that the mother was physically, sexually, and mentally abused by the father and that the mother feared for the safety of the child were too general to establish an exception); *Blondin v. Dubois*, 189 F.3d 240, 247 (2nd Cir. 1999) (refusing to return a child to France because she faced a grave risk of physical abuse from her father there).

11. While there is evidence that American businessmen face a heightened risk of kidnapping and violence and that Rodriguez himself has been threatened, there is no clear and convincing evidence of serious danger in Barranquilla to a thirteen-year old Colombian national who also holds U.S. citizenship and who lives there with his Colombian mother and family. There is no evidence that Isidoro's return would subject him to a *grave* risk of physical or psychological harm or otherwise place him in an intolerable situation. To the contrary, there is evidence that Isidoro's family and other relatives live safely in Barranquilla and that Isidoro, on his return, would be able to resume his habitual residence, enjoy his friends and family, and return to the school where he was previously enrolled.

12. Rodriguez's reliance on Article 20 to bar Isidoro's return to Colombia is unpersuasive. The parties have not cited, nor has the Court found, any authority applying the Article 20 exception to return based on "fundamental principles of the [United States] relating to the protection of human rights and fundamental freedoms." This seldom-cited[36] and somewhat obscure provision[37] was adopted

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[36]As of 1997 the Article 20 defense had successfully been invoked only twice internationally—in cases where the constitutionality of the Convention itself was challenged—and not at all in the United States. *See* Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (17—2 1 March 1997), Permanent Bureau of the Hague Conference on Private International Law ¶ 78 (1997).

[37]One commentator notes that Article 20 has "nearly faded without a trace." Beaumont, P.R. & McEleavy, P.E., The Hague Convention on International Child Abduction 172 (1999). This may be because Article 20

as a compromise between those countries that wanted a public policy exception in the Convention and those that did not.[38] It was meant to be "restrictively interpreted and applied. . . on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."[39] There is no record evidence that approaches this threshold. Thus, Article 20 has no application here.[40]

P.E., The Hague Convention on International Child Abduction 172 (1999). This may be because Article 20 and Article 13b appear to be redundant. If the return of a child would violate fundamental U.S. principles relating to human rights, it would also involve returning him to an intolerable situation.

38 Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, Pub. Notice 957, 51 Fed. Reg. 10,494, 10,510 (1986) (hereinafter "State Department Legal Analysis"). This legal analysis of the Hague Convention prepared by the State Department was provided to the Senate Committee on Foreign Relations to assist that Committee and the full Senate in their consideration of the Convention prior to ratification.

39 State Department Legal Analysis at 10,510.

40 Rodriguez argued that he was denied due process in the Colombian courts when the Barranquilla Family Court decreed the custody arrangement between him and his former wife and later ordered increases in support payments without notice. He also argued that the Barranquilla Family Court did not respect the wishes of Isidoro with respect to custody. These arguments are factually and legally flawed. Article 20 does not contemplate that courts applying the provision must compare the due process safeguards provided in the petitioner's country with those pitvided in the respondent's country or with some ideal notion of due process. *See* State Department Legal Analysis at 10,511. Further, the facts disclose no violations of Rodriguez's or Isidoro's due process rights in connection with the custody determination, which is reflected in the court-approved agreement. That Rodriguez may have been denied notice and opportunity for

13. The final exception, found in Article 13 ¶ 2, allows a court to decline to return a child when the child objects to being returned and is of sufficient age and maturity such that his views may be considered. This "age and maturity" defense, like the others, is to be narrowly construed. *See England v. England,* 234 F.3d 268, 272 (5th Cir. 2000). Both the maturity and the child's objection must be proved by a preponderance of the evidence.[41] The discretionary aspect of this defense is important because of the potential for undue influence by the person who allegedly wrongfully retained the child.[42]

14. Isidoro is a normal child of thirteen who seems to be coping well with an exceptionally difficult situation. Yet, he is certainly not mature nor sophisticated beyond his years, and, like all adolescents, he is susceptible to suggestion and manipulation. Indeed, some of his

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a hearing with respect to later orders for increases in child support has no bearing on a determination under the Hague Convention whether the child's return would violate fundamental principles of the United States relating to the protection of human rights and fundamental freedoms.

[41]*See id.* (reversing a district court and finding that a 13-year old who had four mothers in twelve years, had been diagnosed with Attention Deficit Disorder, had learning disabilities, took Ritalin regularly, and was scared and confused by the circumstances producing the litigation was not sufficiently mature to meet the standard—but, significantly, *not* finding that a 13-year old is not sufficiently mature as a matter of law)

[42]*See* Pub. Notice 957, 51 Fed. Reg. 10,494, 10,509 (1986) ("As with the other Article 13 exceptions to the return pbligation, the application of this exception is not mandatory. . . . A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child.").

statements regarding reasons for staying in the United States appear to be the product of suggestion, echoing the preferences of his father. Isidoro does not have a strong objection to returning to Colombia, as he has little or no fear for his personal safety and has no objection to living with his mother. His stated preference is to remain in the United States for now to spend more time with his father, but then to spend equal time in the United States and Colombia. To accommodate Isidoro's preference would be a custody determination that is not at issue in a Hague Convention petition. Because Isidoro is not exceptionally mature and does not object strongly to returning to Colombia, the Article 13 ¶ 2 exception has not been established.

15. Under these circumstances, where Isidoro has been wrongfully retained in the United States and none of the available exceptions have been established, ICARA and the Hague Convention require Isidoro's return to Colombia "forthwith."[43] An appropriate order will issue.

Alexandria, Virginia
May 6, 2002

/s/
T.S. Ellis, III
United States District Judge

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[43] Hague Convention art. 12.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

AMALIN HAZBUN ESCAF,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No 01-1926-A
	)	
ISIDORO RODRIQUEZ,	)	
	)	
Respondent.	)	

ORDER

By Order dated May 6, 2002, the Court granted judgment in favor of petitioner and ordered that the minor child Isidoro Rodriguez Hazbun be promptly returned to the custody of petitioner, the child's mother, in Barranquilla, Colombia. The Court granted a temporary stay of its Order for the limited purpose of allowing respondent to seek a stay pending appeal from the United States Court of Appeals for the Fourth Circuit. The stay was to remain in effect only until the Court of Appeals ruled on respondent's expedited motion for a stay pending appeal. On May 22, 2002, the Fourth Circuit denied respondent's request for a stay. On May 24, 2002, the Fourth Circuit stayed this Court's May 6, 2002 Order, and its own May 22, 2002 Order in light of respondent's filing of an application for a stay with the United States Supreme Court. The Fourth Circuit's stay was to remain in effect until such tune as the Supreme Court acted on the matter. On May 29, 2002, Chief Justice Rehnquist denied respondent's application for stay of enforcement of judgment pending expedited appeal, and on May 31, 2002, the Fourth Circuit issued an Order clarifying that its stay, issued May 24, 2002, had no further effect. Also on May 31, 2002, respondent renewed his application to the

United States Supreme Court for a stay of this Court's May 6, 2002 Order pending expedited appeal. Respondent's application was addressed to Justice O'Connor, who referred it to the full Supreme Court.

On June 7, 2002, this Court held a hearing in the matter and, as there was no stay then in effect, issued an Order directing respondent to transfer physical custody of the child to petitioner immediately. The Order also directed petitioner and the child to remain in the United States pending further Order of the Court.

On June 10, 2002, the United States Supreme Court denied respondent's second application for a stay of this Court's May 6, 2002 Order.

Accordingly, and for good cause,

It is **ORDERED** that the travel restriction imposed on petitioner and the child by the Court's Order of June 7,2002 is **REMOVED.**

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
June 10, 2002

/s/
T.S. Ellis, III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

AMALIN HAZBUN ESCAF,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 01-1926-A
	)	
ISIDORO RODRIQUEZ,	)	
	)	
Respondent.	)	

ORDER

The matter comes before the Court on respondent's motion for a three-day stay pending decision of the United States Court on June 10, 2002, at 10:00 a.m, regarding respondent's emergency application for a stay of this Court's May 6, 2002 Order pending appeal. Respondent's application for a stay has already been denied by the United States court of Appeals for the Fourth Circuit and by Chief Justice Rehnquist. The Court is advised that respondent has petitioned Justice O'Connor to enter a stay, but no decision has issued. Thus, there is currently no stay of the Court's May 6, 2002 Order in effect from either the Fourth Circuit or the Supreme Court. Accordingly, and for the reasons stated in denying respondent's original motion for a stay pending appeal,

It is **ORDERED** that respondent's motion for a three-day stay in **DENIED**.

It is further **ORDERED**, however, that respondent **APPEAR** at2:00 p.m., Friday, June 7, 2002, and **PRODUCE** the minor child, Isidoro Rodriguez Cruz, at which time the Court will determine:

(i) Whether there is to be an immediate transfer of custody of the child to petitioner and, if so, whether petitioner should be ordered to remain with the child in the United States until 12:00 p.m., Monday, June 10, 2002, at which time it is anticipated that an order of Justice O'Connor or the Supreme Court will have issued; or

(ii) whether the transfer of custody should be delayed until 12:00 p.m., Monday, June 10, 2002, pending issuance of any order by Justice O'Connor or the Supreme Court.

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
June 6, 2002

/s/
T.S. Ellis, III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AlexandriaDivision

AMALIN HAZBUN ESCAF,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 01-1926-A
	)	
ISIDORO RODRIQUEZ,	)	
	)	
Respondent.	)	

ORDER

The Court has received letters dated June 3, 2002 from both petitioner and respondent.[1] Petitioner's letter requests the entry of an Order directing the arrest and return of the minor child Isidoro Rodriguez Hazbun to effectuate this Court's Order of May 6, 2002. Respondent's letter requests that this Court refrain from further action pending additional appellate review. No formal motions have been filed by either petitioner or respondent.

On May 6, 2002, this Court entered an Order[2] granting judgment in favor of petitioner and ordering that the minor child Isidoro Rodriguez Hazbun be promptly returned to the custody of his mother in Barranquilla, Colombia. The Court granted a temporary stay of its Order for the limited purpose of allowing

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[1]In the future, all communications by the parties with the Court should be via proper motions or pleadings, not letters.

[2]*Hazbun Escaf v. Rodriquez*, Civ. No. 01-1926-A (E.D. Va. May 6, 2002) (judgment order).

respondent to seek a stay pending appeal from the United States Court of Appeals for the Fourth Circuit The stay was to remain in effect only until the Court of Appeals ruled on respondent's expedited motion for a stay pending appeal. On May 22, 2002, the Fourth Circuit denied respondent's request for a stay.[3] On May 24, 2002, the Fourth Circuit stayed this Court's May 6, 2002 Order, and its own May 22, 2002 Order in light of respondent's filing of an application for a stay with the United States Supreme Court.[4] The Fourth Circuit's stay was to remain in effect until such time as the Supreme Court acted on the matter. On May 29, 2002, Chief Justice Rehnquist denied respondent's application for stay of enforcement of judgment pending expedited appeal.[5] On May 31, 2002, the Fourth Circuit issued an Order clarifying that its stay, issued May 24, 2002, had no further effect and directing petitioner to present her motion for an order directing the arrest and return of her minor child to this Court.[6] Also on May 31, 2002, respondent renewed his application to the United States Supreme Court for a stay of this Court's May 6, 2002 Order pending expedited appeal, which application is currently scheduled

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3 *Hazbun Escaf v. Rodriguez*, No. 02-1487 (4th Cir. May 22, 2002) (order).

4 *Hazbun* Escaf v. Rodriguez, No. 02-1487 (4th Cir. May 24, 2002) (order).

5 *Rodriguez v. Hazbun Escaf*, App. No. 01A930 (U.S. May 29, 2002) (letter from William K. Suter, Clerk of the Court).

6 *Hazbun Escaf v. Rodriguez*, No. 02-1487 (4th Cir. May 31, 2002) (order).

for the Supreme Court's June 6, 2002 Conference.[7] On June 3, 2002, respondent petitioned the Fourth Circuit for a rehearing en banc of the panel's decision to deny his motion for a stay pending appeal.

As a result, there is currently no stay of this Court's May 6, 2002 Order, which remains in full effect and obligates respondent promptly to return the child Isidoro Rodriguez Hazbun to the custody of petitioner. To the extent that respondent's June 3, 2002 letter asks the Court to refrain from further action pending additional appellate review, that letter is appropriately construed as a renewal of respondent's motion for a stay of the Court's May 6, 2002 Order. Because there is no good cause for granting a stay,

It is **ORDERED** that respondent's renewed motion for a stay of the Court's May 6, 2002 Order is **DENIED.**

It is further **ORDERED** that respondent, on or before 2:00 p.m., Friday, June 7, 2002, **DELIVER** the minor child, Isidoro Rodriguez Hazbun, to the child's mother, petitioner Amalin Hazbun Escaf, so that she may return to Colombia with the child.

It is further **ORDERED** that the delivery of custody of the minor child shall occur at Courtroom 801 of the Albert V. Bryan U.S. Courthouse in Alexandria, Virginia or at such other place mutually agreed by the parties.

It is further **ORDERED** that should the transfer not occur by 2:00 p.m., Friday, June 7, 2002, respondent must **APPEAR** before the Court at 2:00 p.m., Friday, June 7, 2002, and **SHOW**

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[7] In the event the United States Supreme Court stays the Court's May 6, 2002 Order, this Order, of course, is also stayed.

CAUSE why he should not be held in contempt for failure to comply with the Court's Orders.

The United States Marshal is directed to serve a copy of this Order on counsel for the petitioner, Patrick H. Stiehm, at 4308 Lawrence Street, Alexandria, Virginia 22309; and on the respondent, Isidoro Rodriguez, at ~~4304~~ 2304 Farrington Avenue, Alexandria, Virginia 22303.

Alexandria, Virginia
June 5, 2002

/s/_____
T.S. Ellis, III
United States District Judge

THE RODRIGUEZ LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW

Isidoro Rodriguez, Esq.
VA Bar No. 21573
US Tax Ct. No. RI-0062

Dra. Irene Rodriguez
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Barranquilla, Colombia
011.575.3480001

May 9, 2002

Ms. Barbara Rowe and/or
Mr. Mike Randy, Office of the Clerk
United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

RE: **Rule 44 Notice of Case Involving Constitutional Question Where United States is Not a Party, *Amalin Hazbun Escaf vs. Isidoro Rodriguez*, E.D. VA No. 01-1926-A; Ct. App. No. 02-1487.**

Greetings:

This will confirm my telephone conversations in which I requested the Clerk's Office of the United States District Court for the Eastern District of Virginia to send you by facsimile a copy of the Notice of Appeal filed May 7, 2002 in the above-referenced case.

Enclosed are an original and three copies of Respondent-

Appellant's Expedited Motion for Stay of Judgment Pending Appeal and an original and three copies of a Request for Judicial Notice by the Court of Appeals of the physical dangers and "zone of war" to Americans presently existing throughout the Republic of Colombia.

First, before the court below, Respondent-Appellant raised as an affirmative defense that the application of the Hague Convention on the Civil Aspects of International Child Abduction dated October 25, 1980 (the "Hague Convention"), and the International Child Abduction Remedies Act, 42 U.S.C. section 11601 *et seq.* ("ICARA"), would violate Respondent-Appellant's and his son's fundamental Constitutional rights. The decision of the court below orders Respondent-Appellant, a United States citizen, to return his thirteen-year-old son (who is also a United States citizen) to Barranquilla, Columbia over his son's objections, and in the face of grave physical danger to American citizens in Columbia.

Second, Federal courts have recognized that since FY 2000, recent concerns by litigants and witnesses for their physical safety in the expanded "zone of war" in Columbia "appear highly relevant to the balancing inquiry that the District Court must conduct" in deciding a motion to dismiss for *forum non conveniens*. *Iragorri v. United Technologies Corp. and Otis Elevator Co.*, 274 F.3d 65, 75 (2nd Cir. 2001) (*en banc*). *See also In re: Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, Order Denying Defendant Ford and Firestone's Motions to Dismiss Columbian and Venezuelan Cases on Ground of *Forum Non Conveniens* at 31-33, J.P.M.L. No. 1373 (S.D. Ind. Mar. 25, 2002), in which the court took judicial notice of United States Department of State announcements, news articles and Internet web sites concerning the recent increased dangers in Columbia. Consistent with these judicial precedents, Respondent-Appellant's present Request for Judicial Notice asks the Court of Appeals to reach the same result here.

In summary, in addition to the relevant exceptions under Art. 13b, Art. 13¶4, and Art. 20., of the Hague Convention and ICARA, the decision of the court below violates the fundamental U.S. Constitutional rights of Respondent-Appellant and his son as a United States citizen to live and stay in the United States during this period of expanded civil war in Colombia, as well as Respondent-Appellant's and his son's fundamental Constitutional and Due Process rights as a parent to rear his son as a U.S. citizen, and the right to maintain and protect the basic father/son relationship. *See Troxel v. Granville*, 530 U.S. 57, __ (2000) (plurality opinion), describing the interest of parents in the care, custody, and control of their children as "perhaps the oldest of the fundamental liberty interests recognized by this Court."

In closing, I thank you for your prompt attention to my request to have my appeal docketed, and to supply me with the appropriate assigned Docket Number 02-1487.

Very truly yours,

Isidoro Rodriguez, Esq.

Enclosure

cc: President George W. Bush, The White House
Attorney General John D. Achcroft, U.S. Dept of Justice
Mr. Paul J. McNulty, U.S. Attorney, E.D. Va.
Mr. Patrick H.Stiehm

THE RODRIGUEZ LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW

Isidoro Rodriguez, Esq.
VA Bar No. 21573
US Tax Ct. No. RI-0062

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Barranquilla, Colombia
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August 20, 2002

Ms. Barbara Rowe, Office of the Clerk
United States Court of Appeals for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23219-3517 (804)916-2737

RE: ***Amalin Hazbun Escaf vs. Isidoro Rodriguez*, E.D. VA No. 01-1926-A; Ct. App. No. 02-1487**.

Greetings:

Pursuant to my letter dated May 9, 2002 (copy attached), issued under FRAP Rule 44, wherein I gave notice to your office of my Constitutional challenge to the Hague Convention as applied, your office was to "certify such fact to the Attorney General." Although the Constitutional question was raised as a challenge to the order of Hon. Judge T.S. Ellis, III, in various pleadings and in the Docketing Statement, to date the Pacer System does not reflect that the Clerk's Office has complied with Rule 44.

Given that the Court Reporter of the Hon. Judge T.S. Ellis III's caused a delay of over 90 days by not complying with my Transcript Order of May 7, 2002, I seek to further delay of this appeal, thus please advise the Attorney General as required under FRAP Rule 44. In closing, I confirm again that I will be personally hand-delivering for filing Appellant's Brief and the Joint Appendix on Friday, August 23, 2002. I hope we have an opportunity to meet.

Very truly yours,

Isidoro Rodriguez, Esq.

Enclosure

cc: Mr. Patrick H.Stiehm (703)935-8266
Mr. Lawrence J. Leiser (703)299-3983

U.S. Department of Justice
Civil Division

MJS:HSScher:lcb

Tel:202-514-4814
Fax:202-514-8151
Washington, D.C. 20530

August 29, 2002

Patricia S. Connor
Clerk, United States Court of Appeals
for the Fourth Circuit
1100 East Main Street
5th Floor, Suite 501
Richmond, VA 23219-3517

Re: Escaf v. Rodriguez. No. 02-1487 (4th Cir.)

Dear Ms. Connor:

This letter is written in response to the Court's letter of August 20, 2002, informing the Department of Justice of appellant's intention to challenge the constitutionality of a federal statute in the above-referenced case. We have now received a copy of appellant's brief in which the constitutional issue is raised and are in the, process of consulting with the Department of State and other interested components with respect to that challenge to determine whether to seek authorization from the Solicitor General to intervene or otherwise participate in this appeal (see 28 C.F.R. 0.20(c)). At this time, we are unable to state whether the government intends to file a brief, especially given the expedited briefing schedule established in this case. Nevertheless, we appreciate your having called this matter to our attention and will advise the Court as soon as possible if the government concludes that participation is appropriate.

Sincerely,

/s/_____
MICHAEL JAY SINGER
HOWARD S. SCHER
Attorneys, Appellate Staff
Civil Division, Room 9116
601 "D" Street, N.W.
Washington, D.C. 20530-0001

COMMONWEALTH OF VIRGINIA:
IN THE JUVENILE AND DOMESTIC RELATIONS
COURT OF THE COUNTY OF FAIRFAX

Master Isidoro Rodriguez-Hazbun,
Petitioner,

v.

Case No. JJ-347-050-01-01
ChiefJudge David Schell

Ms. Amalin Hazbun Escaf,
Respondent.

PETITION TO MODIFY AND AMEND CUSTODY AGREEMENT BASED ON MATERIAL CHANGE OF CIRCUMSTANCE AND IN THE BEST INTEREST OF MINOR CHILD PETITIONER

TO: Ms. Amalin Hazbun Escaf
Kra. 55 No.80–158
Barranquilla, Colombia
Telephone: 011-5753-583958

Petitioner, Master Isidoro Rodriguez-Hazbun, respectfully represents the following in support of his Petition, pursuant to Va. Code § 20-124.3(7) and (8), the precedents in *Haase v. Haase*, 20 Va. App. 671, 460 S.E. 2d 585 (1995), as well as *Keel v. Keel*, 225 Va. 606 (1983), and his fundamental right as a United States citizen, to request the Court to modify the custody agreement between his parents, to order that he not be required to return to the Republic of Colombia due to civil unrest, physical danger, and limited educational opportunity, and to order the modification of the custo ly agreement between his parents to direct that he stay in the United States in the sole custody of his father, Mr. Isidoro Rodriguez, Esq. as defined under 20 Va. Code § 124.1, and grant

other relief the Court deems appropriate:

1. Petitioner, Master Isidoro Rodriguez-Hazbun (Petitioner), is a United States Citizen of twelve years, four months of age, with Social Security No. 213-55-7508, and United States Passport Number 701466034 (Petitioner Exhibit 1).

2. Petitioner, Master Isidoro Rodriguez-Hazbun, is domiciled and resides at 2059 Huntington Avenue, Suite 1600, Alexandria, with his father, Mr. Isidoro Rodriguez, Esq., a United States Citizen, a resident of the Commonwealth of Virginia since 1979, and an active Member of the State of Virginia Bar No. 21573.[1] Petitioner Master Isidoro Rodriguez-Hazbun's father Mr. Isidoro Rodriguez, Esq., has at all times been a nurturing father who has bonded and cared for the child of the parties, taking Petitioner both on annual vacations to the United States, and business travel to view numerous *pro hoc vice* civil actions in various Court's in the United States.

3. Respondent, Ms. Amalin Hazbun Escaf, is a citizen of the Republic of Colombia, is Petitioner's mother, and resides at Kra. 55 No.80–158, Barranquilla, Colombia.

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[1]After leaving a SES White House appointment as Director of the Office of Civil Rights, USDA in the first Reagan/Bush Administration, Mr. Isidoro Rodriguez, Esq., has for the past 18 years maintained and marketed his professional services as a Virginia attorney with an international law practice from Alexandria, Virginia. In 1983, he was Assistant General Counsel/Contracts Administrator on a $2 Billion EXXON mega-coal project in the Republic of Colombia. In 1987, the U.S. Embassy requested that he consider representing a group of U.S. citizens who are the finders and claimants of fourteen treasure ship targets located off the coast of the Republic of Colombia valued at $1.5 to $10 Billion USD. In 1989, a breach of contracts suit was filed against the Republic of Colombia, *Sea Search Armada vs. President of the Republic of Colombia*, Superior Tribunal Judicial District of Barranquilla, Rad. No. 20-166. This case has been described by Members of the U.S. Congress as the "largest private claim by American citizens against a foreign state pending in the world," (Letter from Congressmen Gilman, Burton and Crane to former Secretary of State Warren M. Christopher). Mr. Isidoro Rodriguez Esq. Virginia Attorney's Lien is 10% of the value of the fourteen targets.

Respondent, Ms. Amalin Hazbun Escaf, is a licensed optometrist, with two successful retail/offices in Barranquilla, Colombia.

4. Mr. Isidoro Rodriguez, Esq., and Respondent Ms. Amalin Hazbun Escaf, were married August 2, 1988, in the jurisdiction of Barranquilla, Republic of Colombia.

5. There was one child born of this marriage, namely, Petitioner Master Isidoro Rodriguez-Hazbun, born on March 10, 1989.

6. As a result of cultural differences which could not be resolved after consultations with five different family psychologists, during the period of 1988 to 1995, and after a one year informal separation in 1995, Mr. Isidoro Rodriguez, Esq., and Respondent Ms. Amalin Hazbun Escaf, in the Summer of 1996 verbally agreed to legal separation, divorce, to divided custody of Petitioner Master Isidoro Rodriguez-Hazbun based on Petitioner best interests, and to not interfere in any manner with said divided custody arrangement. *See Mullen v. Mullen*, 188 Va. 259, 49 S.E.2d 349 (1948); *see also Brooks v. Brooks,* 201 Va. 731, 113 S.E.2d 872 (1960); *Andrews v. Geyer*, 200 Va. 107, 104 S.e.2d 747 (1958).

7. Mr. Isidoro Rodriguez, Esq., and Respondent Ms. Amalin Hazbun Escaf last cohabited until September 30, 1996, at Kra. 55 No.80–158, Barranquilla, in the Republic of Colombia, and were legally divorced in Barranquilla, Colombia on November 27, 1997.

8. Based on and in consideration of said verbal agreement to divided custody, and to not interfere in any manner to said divided custody arrangement, Mr. Isidoro Rodriguez, Esq., signed a property settlement agreement in October, 1996, renouncing his rights to all real and personal property acquired jointly after the marriage in 1988, and gave clear title of the family residence to Respondent.

9. Subsequently, in March, 1997, when Master Isidoro Rodriguez-Hazbun and Mr. Isidoro Rodriguez, Esq. were preparing to go the Paris, France for Easter Vacation, on or about March 11, 1997, in violation of the divided custody agreement,

Respondent Ms. Amalin Hazbun Escaf filed a Complaint for Sole Custody, and sought and obtained an *ex parte* temporary order issued by the 1st Family Court of Barranquilla, restricting Petitioner Master Isidoro Rodriguez-Hazbun to visits with his father Mr. Isidoro Rodriguez, Esq., to only alternate Saturday visits of eights hours from 8 a.m. to 6 p.m.

10. Other incidents in violation of agreement of divided custody, and in attempts to intimidate, coerce and emotionally abuse Petitioner Master Isidoro Rodriguez-Hazbun bond of affection with his father Mr. Isidoro Rodriguez, Esq. are as follows:

a. During the period of April 4, 1997 to July 30, 1997, the Respondent repeatedly kept Petitioner Master Isidoro Rodriguez-Hazbun up late the night before and delayed in permitted the beginning of his time with his father.

b. Threatened to have Petitioner's father, Mr. Isidoro Rodriguez, Esq., as a North American forcibly removed from the Republic of Colombia by the national police.

11. These actions of Respondent did place Petitioner Master Isidoro Rodriguez-Hazbun in continued fear for his and his father's safety.

12. All filings by Petitioner's father, Mr. Isidoro Rodriguez, Esq., to obtain a hearing by the Court in Barranquilla of the above incidents, and for the Court to meet with Petitioner Master Isidoro Rodriguez-Hazbun, have been refused. The Court stated that it was not responsible to compel Respondent to communicate with Mr. Isidoro Rodriguez, Esq., on any issue regarding Petitioner Master Isidoro Rodriguez-Hazbun based on the father being a North American, and not part of the Colombian society.

13. Because of the Judge in Barranquilla Family Court's above stated position and refusal to reconsider her temporary order limiting Petitioner Master Isidoro Rodriguez-Hazbun's access and time with his father, Mr. Isidoro Rodriguez, Esq. entered into an agreement on July 27, 1997, modifying the verbal agreement of divided custody. This modified agreement

provided for joint custody, with the primary residence being with Respondent during the school week, the dividing of holidays, and for alternative week-ends stays at Petitioner's father home.

14. Subsequent to the agreement, and particularly beginning in 1999, greater civil unrest has occurred in all of the Republic of Colombia, such that the United States Department of States warns United States citizens against travel to Colombia, because "[m]ore than 3,000 people are kidnaped each year throughout Colombia, and there is greater risk of being kidnaped than in any other country in the world." (Petitioner Exhibit 2).

15. Kidnaping of U.S. citizen children has occurred, because "[c]hildren and foreigners are increasingly targeted, apparently because kidnappers believe they will fetch the highest ransoms." (Petitioner's Exhibit 3).

16. The danger has become so critical in Colombia that the Government of the Republic of Colombia has reported that there has been an "exodus" of Colombian citizen 600,000 and foreigners from that country since 1999. (Petitioner's Exhibit 4)

17. Regarding the above cited change of circumstances and as to the best interest of the minor child Petitioner Master Isidoro Rodriguez, Respondent Amalin Hazbun Escaf refuses to communicate in any manner with Petitioner's father Isidoro Rodriguez, Esq. regarding any issue concerning Petitioner Master Isidoro Rodriguez safety or welfare, refuses even to discuss with Petitioner Master Isidoro Rodriguez-Hazbun his own increasing awareness and concerns for his safety and welfare, and refusing to discuss with Petitioner his desire to spend more time with his father, and to live with his father in the United States. In reaction Respondent Ms. Amalin Hazbun Escaf and her family have increasingly expressed to Petitioner Master Isidoro Rodriguez-Hazbun anti/negative United States opinions and sentiments.

19. Despite repeated filings the Family Judge in Barranquilla, Colombia refuses to consider the above, and refuses to require communications by Respondent on this issue, and still refuses to hear Petitioner, and also demonstrates a disregard of

Petitioner Master Isidoro Rodriguez status and rights as a citizen of the United States.

20. Petitioner Master Isidoro Rodriguez-Hazbun recently determined that it was in his best interest to stay in the United States and not to return to the Republic of Colombia. Petitioner is now in the process of registering for the next academic year at the Fairfax County Mark Twin Middle School, 4700 Franconia Road, Alexandria, Virginia.

21. Based on the best interests of the minor child of the parties Petitioner Master Isidoro Rodriguez-Hazbun, as a United States citizen requests that responsibility for his care and sole custody be granted to the father, Mr. Isidoro Rodriguez, Esq.

WHEREFORE, the Petitioner Master Isidoro Rodriguez-Hazbun prays that his father, Mr. Isidoro Rodriguez be granted temporary and permanent sole custody; that the Respondent Ms. Amalin Hazbun Escaf be ordered to pay reasonable sums for the support and maintenance of Master Isidoro Rodriguez-Hazbun in accordance with the order now in place, both while this suit is pending and following entry of a final decree;[2] that upon entry of a final decree in this matter, the Court grant the Petitioner Master Isidoro Rodriguez-Hazbun all rights and remedies afforded by Virginia Code § 20-124.1, and § 20-124.3(7), as well as the above cited relevant precedents of the Courts of Virginia; that the Respondent Ms. Amalin Hazbun Escaf be enjoined from threatening, harassing, harming, or abusing either the Petitioner Master Isidoro Rodriguez-Hazbun or Mr. Isidoro Rodriguez, Esq. in any way; and that the Petitioner Master Isidoro Rodriguez-Hazbun may have such other and further relief as the nature of this case may require, including the ordering that medical and school

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[2]Mr. Isidoro Rodriguez, Esq., since 1996 has paid monthly for private school tuition and approx. $500 a month to Respondent Amalin Hazbun Escaf for the child support.

records be sent to Petitioner's father so to permit registration in the above referenced school.

Respectfully submitted,

Master Isidoro Rodriguez-Hazbun

Isidoro Rodriguez, Esq.
Virginia State Bar No. 21573
Fairfax Bar Assn. No. 39242
Counsel for Petitioner

U.S. CONSTITUTION, AMENDMENT V, provides in pertinent part, that:

> No person shall be . . . deprived of life, liberty or property without due process of law.

U.S. CONSTITUTION, AMENDMENT IX, provides in pertinent part, that:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people.

28 U.S.C. § 2403 - Intervention by United States or a State; constitutional question.

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Federal Rules of Civil Procedure Rule 19, reads in pertinent part that:

Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible.

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible.

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder.

A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision

(a)(1)--(2) hereof who are not joined, and the reasons why they are not joined.

Federal Rules of Civil Procedure Rule 52(b), reads in pertinent part that:

. . . . When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the finding may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention), Oct. 25, 1980, T.I.A.S. No 11,670, 19 I.L.M. 1501

Art. 13 Notwithstanding the provisions of the proceeding Article, the judicial. . . authority of the requested State is not bound to order the return of the child if the person . . . opposes it return establishes that-

> b) there is a grave risk that his . . . return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial . . . authority may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Article 20 The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedom.

Art 35 This Convention shall apply as between Contracting States only to wrongful removals or retentions . . . .

The International Child Abduction Remedies Act, Pub Law 100-300 ("ICARA"), 42 U.S.C. §§ 11601-11610

42 U.S.C. § 11603

(a) Jurisdiction of courts:

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petition

Any person seeking to initiate judicial proceedings under the Convention for the return of a child . . . may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(e) Burden of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence-

(A) in the case of an action for the return of a child, that the child has been wrongfully . . . retained within the meaning of the Convention; and . . . .

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing-

(A) by clear and convincing evidence that on of the exceptions set forth in article 13(b) or 20 of the Convention applies; and

(B) by a preponderance o the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

42 U.S.C. 11604(b) Limitation of authority

No court exercising jurisdiction of an action brought under section 11603(b) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

22 CFR 94.4 Prohibitions

(A) The U.S. Central Authority is prohibited from acting as an agent or attorney or in any fiduciary capacity in legal proceedings arising under the Convention.

Department of State, Federal Register, Vol. 51 No. 58

AT PAGE 10504, ¶I.A. "Notwithstanding, the general application of the Convention to children under sixteen, it should be noted that the wishes of mature children regarding their return are not ignored, by the Convention. Article 13 permits, but does not require the judicial authority to refuse to order the child returned if the child "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." The rule of the child's preference in return proceedings is discussed further at III.I(2), *infra.*

AT PAGE 10507, "¶iii. Custody rights arising by reason of agreement having legal effect. Parties who enter into a private agreement concerning a child's custody have recourse under the Convention if those custody rights are breached. Article 3. . . . In the U.S. view, the provision should be interpreted expansively to cover more than only those agreements that have been incorporated in or referred to in a custody judgement. *Actes et documentes de Quartorzieme Seesion. (1980) Volume III. Child Abduction,* Comments of Governments at 240. The reporter's observations affirm a broad interpretation of this provision:. . . ."

AT PAGE 10510. ¶(d)*Child's preference* The third unlettered paragraph of Article 13 permits the court to decline to order the child's returned if the child objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take account of the child's view.

AT PAGE 10510, ¶3. Article 20. Article 20 limits the return obligation of Article 12. It states: "The return of the child under the provisions of Article 12 may be refused if this wold not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedom." This provision was to be invoked "**on the rare occasion that return of the child wold utterly shock the conscience of the court or offend all notions of due process.** . . . The following explanation of Article 20 is excerpted form paragraph 118 of the Perez-Vera Report at pages 461-2:"

> . . . [Article 20] is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. **Consequently, so to be able to refuse to return**

a child on the basis of this article, it will be necessary to show that the fundamental principals of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles.(Emphasis added)

Virginia Code 20-124.3. Best interests of the child; visitation.

In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendent lite orders pursuant to ° 20-103, the court shall consider the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;

....

3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;

....

5. The role which each parent has played and will play in the future, in the upbringing and care of the child;

6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;

7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;

8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;

....

FILED
APR 21 2003
CLERK

APR 25 PAGE 3

No. 02-1268

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

Isidoro Rodriguez, and his minor Son,
Isidoro Rodriguez-Hazbun

Petitioners,

v.

Amalin Hazbun Escaf,

Respondent.

On Petition For Writ of Certiorari
United States Court of Appeals for the Fourth Circuit

SECOND SUPPLEMENTAL AUTHORITY IN SUPPORT OF GRANTING THE PETITION FOR WRIT OF CERTIORARI AND JUDICIAL NOTICE OF THE "ZONE OF WAR" THROUGHOUT THE REPUBLIC OF COLOMBIA

Pursuant to the directions of the Clerk's Office, Rodriguez files this Second Notice of Supplemental Authority of an opinion just issued by the United States Court of Appeals for the Third Circuit, in *Amanda Walker-Serrano, by her parents: Lisa Walker; Michael Serrano*, No. 01-4098 (3rd Cir. April , 2003), in support of the above referenced petition and motion.

The Third Circuit Court of Appeals reconfirmed the United States Supreme Court holding in *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 506 (1969), confirming the right of

a minor to sue in their own name so to protect their respective Constitutional rights. The authority is specifically pertinent because, it rejects the Hon. Judge T.S. Ellis III's, and the Fourth Circuit holdings that Isidoro could not intervene to protect his Constitutional rights.

Isidoro Rodriguez, Esq.
Petitioner in Pro Per
Member of Supreme Court Bar
Date of Birth: April 6, 1946
Virginia Bar No. 21573

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April 21, 2003

Circuit Clerk
United States Court of Appeals
for the District of Colombia Circuit
U.S. Courthouse, 5th Floor
Third Street and Constitution Avenue
Washington, D.C, 20001

RE: CITATION TO SECOND SUPPLEMENTAL AUTHORITY
Rodriguez v. U.S. District Court for the District of Colombia, and U.S. Department of State, Office of Children Issues for Consular Affairs, Docket No. 03-5092

Greetings:

Pursuant to Circuit Rule 28(j), the undersign counsel files one original and four copies of this letter, and five copies of the opinion of United States Court of Appeals for the Third Circuit, in *Amanda Walker-Serrano, by her parents: Lisa Walker; Michael Serrano*, No. 01-4098 (3rd Cir. April , 2003), as a second supplemental authority in support of the above referenced pending Petition for Writ of Mandamus on behalf of Petitioners Isidoro Rodriguez-Hazbun ("Isidoro"), and Isidoro Rodriguez, Esq.("Rodriguez").

The Third Circuit Court of Appeals reconfirmed the United States Supreme Court holding in *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 506 (1969), confirming the right of a minor to sue in their own name so to protect their respective Constitutional rights. The opinion is specifically relevant in confirming Rodriguez and Isidoro's arguments that the Clerk of the the District Court be order to place Isidoro as a Plaintiff as captioned in the Complaint claiming his rights under the United States Constitution, and that Mr. M. Blair Sibley appear as his counsel.

Very truly yours,

Isidoro Rodriguez, Esq.

Attachments

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of a Second Supplemental Authority with copies of the 3rd Cir. Opinion, were served on April 21, 2003, by ECF to the parties listed below:

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United States District Court
for the District of Columbia
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Clerk of the Court
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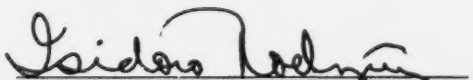

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PRECEDENTIAL

Filed April 15, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-4098

AMANDA WALKER-SERRANO, by her parents;
LISA WALKER; MICHAEL SERRANO

v.

DONALD LEONARD, Individually and in his official capacity as President of the Lackawanna Trail School Board; CLYDE ELLSWORTH, Dr., Individually and in his official capacity as Superintendent of the Lackawanna Trail School District; NANCY SIMON, Individually and in her official capacity as Principal of the Lackawanna Trail Elementary School; PAT CARPENTER, Individually and in her official capacity as a teacher at the Lackawanna Trail Elementary School

Amanda Walker-Serrano,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
D.C. Civil Action No. 99-cv-00716
(Honorable A. Richard Caputo)

Argued/Submitted Pursuant to Third Circuit LAR 34.1(a)
July 12, 2002

Before: SCIRICA and GREENBERG, *Circuit Judges*,
and FULLAM, *District Judge**

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*The Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

(Filed: April 15, 2003)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*:

In this civil rights action, plaintiff, a third grade elementary school student, sued her teachers, school principal and school board for damages under 42 U.S.C. § 1983 for allegedly preventing her from circulating a petition objecting to a planned third grade outing to the circus. The District Court granted summary judgment to defendants. We will affirm.

I.

Plaintiff Amanda Walker-Serrano was a nine-year-old third grade student at the Lackawanna Trail Elementary School. Walker-Serrano's third grade class planned a voluntary field trip to the Shriner's circus in Wilkes-Barre on April 7, 1999. Walker-Serrano did not approve of the voluntary outing because she believed the circus was cruel to animals. As a result, she prepared a handwritten petition stating, "We 3rd grade kids don't want to go to the circus

because they hurt animals. We want a better feild [sic] trip." On February 4, Walker-Serrano brought the petition to the playground at recess, where she persuaded more than thirty of her classmates to sign it.

The following day, February 5, Walker-Serrano was at her classroom desk during a class period of silent reading and independent work. A few students gathered at Walker-Serrano's desk. The classroom teacher, Elaine Mercanti, while breaking up the gathering, observed the petition on Walker-Serrano's desk and told her to put it away.

Later that day, Walker-Serrano again brought her petition to the schoolyard at recess. Defendant Pat Carpenter, one of the teachers supervising recess, observed a group of students around Walker-Serrano near a patch of ice on the playground. Carpenter then noticed that one of the female students was crying—she had fallen on the ice and was bleeding. Carpenter observed Walker-Serrano with a pencil or pen and the petition in the middle of the students and fearing that a student might be injured by the pencil or pen, instructed Walker-Serrano to put the objects away. Walker-Serrano contends that Carpenter told her either "put it away" or "you can't have that here."[1]

Walker-Serrano was never punished for soliciting signatures for her petition or for possessing the petition. Furthermore, Walker-Serrano attended the Lackawanna School Board meeting on February 22, 1999 in order to express her opposition to the scheduled circus field trip.

On April 7, 1999, the third grade class attended the Shriner circus as planned. Walker-Serrano and her mother stood outside the circus and protested alleged cruelty to animals. Local media covered the protest.

The day prior, April 6, Walker-Serrano sought—and received—permission to pass out coloring books and stickers which dealt with cruelty to animals at the circus to her fellow students at school.

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1. For reasons of safety, the elementary school maintains it had an unwritten policy—since codified—prohibiting writing implements on the playground. The parties dispute whether this was the reason for Carpenter's action.

There was also some interplay between Walker-Serrano's parents—Lisa Walker and Michael Serrano—and school officials. When Walker-Serrano returned home on February 5, she informed her mother that she was not permitted to circulate her petition. Mrs. Walker telephoned defendant Nancy Simon, principal of the Lackawanna Trail Elementary School, and defendant Donald Leonard, president of the school board.

Shortly thereafter, Lisa Walker and Michael Serrano retained an attorney, who sent the school district a letter raising concerns about possible violations of Walker-Serrano's First Amendment rights. The district's solicitor, Sandra Boyle, responded that no rights were violated because Walker-Serrano was not prevented from expressing her views on the circus; she was simply told to put the petition away when her "activities briefly disrupted classroom instruction and may have contributed to a situation where another child fell down during recess." Boyle also expressed the view that "[e]lementary schools are not generally the environment for petition circulation."

On February 22, 1999, Walker-Serrano's parents accompanied her to the school board meeting to raise their concerns about the handling of the petition. Walker-Serrano's parents spoke, and the board and Principal Simon received copies of the petition, but no action was taken. Three days later, Solicitor Boyle sent a letter to Walker-Serrano's attorney noting a school policy[2] that

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2. The relevant portion of the Policy provides: "The Board respects the right of students to express themselves in word or symbol and to distribute materials as a part of that expression, but recognizes that the exercise of that right must be limited by the need to maintain an orderly school environment and to protect the rights of all members of the school community . . . . The Board shall require that students who wish to distribute materials submit them for prior review. Where the reviewer cannot show within two school days that the materials are unprotected, such material may be distributed. Appeal from prior review shall be permitted to the Superintendent and the Board in accordance with district rules." This policy was developed pursuant to 22 Pa. Code. § 12.9(e), which provides, "School officials may require students to submit for prior approval a copy of materials to be displayed, posted or distributed on school property." (applies to all Pennsylvania public school students).

requires prior review of materials to be distributed by students.

Walker-Serrano's counsel suggested that the presentation at the board meeting should satisfy the requirements of the policy and that, because the policy allows distribution after two days of inaction by the school, Walker-Serrano could circulate the petition. Boyle responded that the petition had not been properly "presented for review." No request to circulate the petition was made after this time.

Walker-Serrano, by her parents, sued the president of the Lackawanna School Board, Donald Leonard; the superintendent of the school district, Clyde Ellsworth; Principal Nancy Simon; and teacher Pat Carpenter, all in their personal and official capacities. They seek damages from the defendants individually and from the school district for alleged violations of Walker-Serrano's rights to freedom of speech and association, violations of her right to petition for redress of grievances, and also under several state constitutional and common law causes of action.

The District Court granted defendants' motion for summary judgment, concluding Walker-Serrano's First Amendment rights were not violated as a matter of law, and finding defendants entitled to qualified immunity. The District Court also concluded the school district—in the person of Donald Leonard in his official capacity—could not be liable, as it lacked sufficient involvement in the actions complained of. Plaintiff appealed.

II.

The public school environment presents special challenges for determining the extent of the First Amendment's protections. That the First Amendment protects student expression within schools is beyond challenge. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). But the First Amendment has never been interpreted to interfere with the authority of schools to maintain an environment conducive to learning. The

Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507. Accordingly, "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[3] *Id.* at 513.

This framework has generally been used to assess the constitutionality of restrictions on speech in high schools and middle schools. In those contexts, we have required that the school demonstrate a "well-founded expectation of disruption" or of interference with the rights of others, before upholding the restriction. *Sypniewski v. Warren Hills Reg'l Bd. of Ed.*, 307 F.3d 243, 253 (3d Cir. 2002); *Saxe*, 240 F.3d at 212.

But any analysis of the students' rights to expression on the one hand, and of schools' need to control behavior and foster an environment conducive to learning on the other, must necessarily take into account the age and maturity of the student. *Fraser*, 478 U.S. at 683-84; *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996) ("Age is a critical factor in student speech cases . . . ."); *Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 738 (7th Cir. 1994) ("[A]ge *is* a relevant factor in assessing *the extent* of a student's free speech rights in school."). The significance of age in this inquiry has called into question the appropriateness of employing the *Tinker* framework to assess the constitutionality of restrictions on

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3. Even when not disruptive, a school may exercise control over speech that bears the imprimatur of the school, such as that in a school newspaper, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), or lewd or plainly offensive expression, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). Neither party urges us to consider this case under either the *Hazelwood* or *Fraser* analyses. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) ("Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others.").

the expression of elementary school students. No other Court of Appeals[4] has ruled on the applicability of *Tinker* in this context. District courts engaging this issue have generally found that *Tinker* provides an appropriate mode of analysis of elementary school students' First Amendment rights. *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994) (distribution of religious literature); *Jeglin ex rel. Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459 (C.D. Cal. 1993) (school dress code).

There can be little doubt that speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students. Human sexuality provides the most obvious example of age-sensitive matter, *see Fraser*, 478 U.S. 683-84, but there are any number of topics that are more appropriate for older students than younger ones. *Cf. Peck v. Upshur County Bd. of Ed.*, 155 F.3d 274, 288 n. (4th Cir. 1998) (holding that a policy permitting distribution by non-students of religious material constitutional in the high school setting, but unconstitutional in the elementary school setting because of "the impressionability of young elementary-age children"); *Slotterback ex rel. Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 296 (E.D. Pa. 1991) (noting the "impressionability" of children at elementary school level is a factor in determining whether to uphold a school policy). Furthermore, as students approach adulthood, their ability to form and express their own views becomes increasingly important. Younger students are at a stage in which learning how to develop relationships and behave in society is as or even more important than their forming particular views on controversial topics. *See Muller*, 98 F.3d at 1538 ("The 'marketplace of ideas,' an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the means of expression.") (opinion of Manion, J.). Instilling appropriate values is a primary goal for our public schools, one that is especially important in the earlier grades. Accordingly, young students demand a

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4. This matter is discussed in *Muller*, 98 F.3d at 1535-39, 1545-47, but with varying views, none of which commanded a majority of the court.

far greater level of guidance—guidance that is fundamental to our public schools' mission.

That age is a crucial factor in this calculus does not necessary mean that third graders do not have First Amendment rights under *Tinker*. *Tinker* provides a flexible standard that arguably is able to incorporate these considerations. *Tinker* permits school regulation of student speech whenever the school can show that the speech would be disruptive, or would interfere with the rights of other students. In essence, *Tinker* requires that schools have a legitimate educational or disciplinary justification for regulating student expression. That elementary schools require a greater degree of control, or a different kind of control, over students might be accommodated within the *Tinker* analysis. At the very least, anything that interferes with the legitimate educational and disciplinary functions of elementary schools could be regulated under *Tinker*.

Supporting recognition of a qualified *Tinker* right is that elementary school students' freedom of conscience has been constitutionally protected for decades. *See, e.g., Ill. ex rel. McCollum v. Board of Ed.*, 333 U.S. 203 (1948) (religious education in public school grades four through nine unconstitutional); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to teach foreign language to ten-year-old). For over fifty years, the law has protected elementary students' rights to refrain from reciting the pledge of allegiance to our flag. *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). Punishing a child for non-disruptively expressing her opposition to recitation of the pledge would seem to be as offensive to the First Amendment as requiring its oration.

Nonetheless, at a certain point, a school child is so young that it might reasonably be presumed the First Amendment does not protect the kind of speech at issue here. Where that point falls is subject to reasonable debate.

In any event, if third graders enjoy rights under *Tinker*, those rights will necessarily be very limited. Elementary school officials will undoubtedly be able to regulate much—perhaps most—of the speech that is protected in higher grades. When officials have a legitimate educational reason

—whether grounded on the need to preserve order, to facilitate learning or social development, or to protect the interests of other students—they may ordinarily regulate public elementary school children's speech.

Turning to this case, even if elementary school children are entitled to some protection under the First Amendment, it might be argued that, under *Tinker*, they have no right to seek signatures from their peers on a petition of the kind at issue here.

As a general matter, collecting petitions is a protected activity under the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). It involves an encounter in which the petitioner advocates a position, seeking to persuade the listener to sign on to the cause. In response, the signer expresses his support for the position expressed. The petition creates an environment that encourages speech of a kind central to the First Amendment's concern. *See id.* ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' ").

Nonetheless, a school setting, especially an elementary school setting, may require a different application. As Judge Greenberg elucidates in his concurring opinion, implicit in petitioning activity is that the young listener is capable of comprehending the advocated position. Furthermore, whether or not the young petitioner is reflecting and acting on her parents' views is relevant. When other legitimate factors are added to the mix, like the undoubtedly valid parental role and prerogatives with respect to other students, and the possibility of subtle coercion on the part of the petitioner, it is clear that school authorities must be given great leeway to regulate and restrict petitioning in elementary schools.

Yet while circulating petitions is clearly not always appropriate for elementary school students, we see no reason to conclude at this juncture that it never is. Plaintiff points out that one of Walker-Serrano's textbooks contained a lesson in which the students are asked to circulate a petition on a matter of community concern. This confirms the common-sense assumption that, at least some

of the time, elementary school students may be capable of circulating petitions in a manner consistent with educational goals, and that petitioning can be a significant learning experience for these children. But where signature gathering interferes with educational goals or interferes with the rights of other students, it can, of course, be restricted. In any event, we see no reason at this point to conclude that, as a general matter, these concerns cannot be addressed under the case-by-case approach specified in *Tinker*. Yet it bears noting that in an elementary school setting, the *Tinker* proscription against interfering with the rights of other young students is especially important.

III.

Regardless of the extent the *Tinker* analysis is properly employed in the elementary school context, the record here does not support a First Amendment violation claim. There is no evidence that defendants acted outside of the permissible scope of their authority over third grade students, even if Walker-Serrano's petition caused no disruption.

Defendants contend they prevented Walker-Serrano from circulating the petition only when the petition appeared to cause disruption under *Tinker*. That may be so. That they encouraged other expressions of Walker-Serrano's opposition to the circus supports their view that their decisions were not based on animus to the position she expressed, but to the particular mode of expression in particular circumstances. Walker-Serrano contends her petition did not cause disruption either on the playground or in the classroom. She does not address whether her petition may have infringed on the rights of fellow students. But even if permitted, a school must be able to regulate the times and circumstances a petition may be circulated in order to fulfill its custodial and pedagogical roles. There can be no constitutional right, if any, to circulate a petition in an elementary school in class during a quiet reading period or on an icy playground.

It is undisputed that defendants did not discipline Walker-Serrano for circulating her petition, in which she

collected over thirty signatures. Because Walker-Serrano and her parents never petitioned the school for permission to circulate the petition (even beyond the signatures already collected) we cannot know that she would not have been permitted to circulate the petition on other occasions.

But the school authorities did something more. They permitted Walker-Serrano to distribute other materials to her fellow classmates — coloring books and stickers — expressing her views about the circus's alleged ill-treatment of animals. Whatever rights of expression Walker-Serrano may have possessed, her teachers, with insight and flexibility, more than accommodated them.

In sum, not only did Walker-Serrano collect over thirty signatures on her petition, she was never punished for this activity. Furthermore, the school authorities encouraged and permitted her to express her views in what they properly regarded as a pedagogically appropriate manner. As in *Fraser*, "[t]here is no suggestion that school officials attempted to regulate [Walker-Serrano's] speech because they disagreed with the views [she] sought to express. Nor does this case involve an attempt by school officials to ban written materials they consider 'inappropriate' for [elementary] school students, or to limit what students should hear, read, or learn about." 478 U.S. at 689 (Brennan J., concurring). Therefore, the record does not permit a finding that Walker-Serrano suffered an injury of constitutional dimension.

Whether or not similar interference with expression may result in a First Amendment violation in other contexts, the special responsibilities of elementary school educators, and our deference to the choices they make in operating schools, precludes elevating this dispute to the level of a constitutional violation. *See Sypniewski*, 307 F.3d at 260 (noting "leeway" granted public secondary and elementary schools). The number of everyday decisions that must be made with respect to the boundaries of acceptable behavior of third graders is so great that courts cannot second guess elementary school officials on every minor dispute involving third graders' expression. To do so would be to turn the courts into the guardians of elementary school discipline, an area within "the comprehensive authority of the States

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and of school officials." *Tinker*, 393 U.S. at 507. Absent punishment for expression, a significant pattern of concrete suppression, or some other form of clear suppression of the expression of elementary school students, a federal First Amendment action is not an appropriate forum for resolution of disputes over schools' control of third graders' conduct.

Because this record does not support Walker-Serrano's contention that defendants violated her First Amendment rights, we need not reach the questions of defendants' qualified immunity or of School Board President Leonard's liability in either his personal or official capacities.

Accordingly, we will affirm the judgment of the District Court.

GREENBERG, *Circuit Judge*, concurring:

I join in the majority opinion, though my approach to this case leads me to file this concurring opinion to emphasize the particular nature of the claimed First Amendment right at issue here. This is not a case in which the defendants precluded the student-plaintiff, Amanda Walker-Serrano, from setting forth her views on the circus to the school authorities or punished her for doing so. Rather, Amanda asserts a First Amendment right to collect signatures on a petition and thus have her fellow eight- or nine-year old third grade students join her protest.[1] While, as the majority opinion points out, maj. op. at 9, "[a]s a general matter collecting petitions is a protected activity under the First Amendment," it seems to me that it will be a rare case in which such conduct should be protected when the signatures are sought from children as young as those involved here, particularly in a school setting.

I think that it is unlikely that the third grade children here could have had knowledge of how a circus treats its animals. After all, I have no such knowledge myself. Yet Amanda induced more than 30 of them to sign a petition that they did not want to go to the circus because it "hurt[s] animals." Of course, I recognize that even adults will sign petitions without understanding the issues involved and in doing so likely will be protected constitutionally, as will be the persons circulating the petitions. But the status of adults differs from that of children at school as in general public officers and agencies have no obligation to protect adults from their own conduct or the importuning by other persons. On the other hand, students are in the temporary custody of the school authorities who must protect them during the period of the custody. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 122 S.Ct. 2559, 2565 (2002). Moreover, an eight- or nine-year old child might not be able to resist the peer pressure to sign a petition and thus might do so even if the petition advocates a position with which he or she does not agree. In any event, a child of such age should not be confronted with having to make the choice to sign or not sign.

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1. We were told the students' age at oral argument.

It is also significant that in Pennsylvania education is mandatory and thus, while I do not doubt that most parents would send their children to school without a legal requirement that they do so, the children to whom Amanda presented her petition were in school in satisfaction of a statutory mandate. *See* Pa. Stat. Ann. tit. 24, §§ 13-1326, 13-1327 (West 1992). At the risk of being regarded as "not with it," "old fashioned," "out-of-date," or "politically incorrect," I acknowledge being of the view that parents do not send their children, particularly young children, to school in order for them to be solicited to state their opinions on matters of public concern or school administration.

I think it clear that it is not at all appropriate for third grade children to be asked to state their views by signing a petition, at least until they have an opportunity to ask for their parents' advice and guidance on the issue involved. Thus, it seems to me that the existence *vel non* of a First Amendment right here should take into account the interests of the children other than Amanda and their relationships within their families. When this case is considered from that perspective it becomes quite evident that Amanda has not advanced any interest worthy of First Amendment protection.

In considering this matter from the perspective of the interests of all the children I am on solid ground. While *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736 (1969), made it clear that students do not shed their First Amendment rights at the schoolhouse gate, the case also indicated that there can be regulation of student speech interfering with the rights of other students. *Id.* at 509, 89 S.Ct. at 738. When Amanda presented her petition to the other children she was infringing on their rights as they were entitled while at school to be free from her solicitation of their signatures. Recently, in upholding a drug testing requirement for students participating in extracurricular activities against a claim that the requirement infringed the students' privacy interests, the Supreme Court, quoting Justice Powell's concurring opinion in *New Jersey v. T.L.O.*, 469 U.S. 325, 348, 350, 105 S.Ct. 733, 746, 747 (1985),

pointed out that "apart from education, the school has the obligation to protect pupils from mistreatment by other children . . . ." *Bd. of Educ. v. Earls*, 122 S.Ct. at 2565. While I recognize that some people are of the opinion that it is never too early for a person to learn to challenge authority, I believe that a school should protect an eight- or nine-year old child from the solicitation of another child to sign a petition and thus this case is without merit.

In the circumstances I agree that we should affirm.

FULLAM, *District Judge*, concurring:

Although I agree that the judgment of the District Court should be affirmed, I am unable to join fully in the opinions of my colleagues. The First Amendment rights of school children are undoubtedly somewhat more limited than the First Amendment rights of adults, as Judge Scirica's Opinion demonstrates. But that does not mean that a nine-year-old child should be treated as if she were a pre-schooler. To suggest that neither Amanda Walker-Serrano nor her classmates had sufficient maturity to express or form valid opinions concerning the proposed class trip to the circus, I find unacceptable. I therefore do not share my colleagues' seeming reluctance to hold that Amanda did indeed have a First Amendment right to circulate her petition. The crucial question, in my view, is whether any of the appellees violated Amanda's Constitutional rights, or whether they were merely imposing reasonable time, place and manner restrictions upon her exercise of those rights. That, in turn, depends upon whether the circumstances gave rise to a reasonable perception of a "well-founded expectation of disruption", *Sypniewski v. Warren Hills Reg'l Board of Education*, 307 F.3d 243, 253 (3rd Circ. 2002).

We are reviewing a grant of summary judgment. Although the record discloses significant factual disputes as to whether there was any actual disruption or interference with the rights of other students, the District Court's conclusion that, even if all such disputes were resolved in favor of the appellants, a distinct likelihood of disruption was present, is, in my view, unassailable. And, although Amanda was prevented from circulating her petition in the classroom, and on one occasion, in the playground at recess, the undisputed evidence establishes that she circulated her petition and otherwise exercised her First Amendment rights without interference from the defendants. The record as a whole clearly demonstrates that no Constitutional violation occurred.

Finally, I note my agreement with the District Court's ruling that, in any event, the defendants in their individual capacities are entitled to qualified immunity; that Mr. Leonard, the President of the School Board, had no liability in his official capacity; and that none of the named-

defendants was responsible for any policy which infringed Constitutional rights.

For all of these reasons, I agree that the judgment appealed from should be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

No. 02-1268

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

Isidoro Rodriguez, and his minor Son,
Isidoro Rodriguez-Hazbun

Petitioners,

v.

Amalin Hazbun Escaf,

Respondent.

On Petition For Writ of Certiorari
United States Court of Appeals for the Fourth Circuit

SECOND SUPPLEMENTAL AUTHORITY IN SUPPORT OF GRANTING THE PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

Pursuant to the instructions received from the Clerk's Office, the undersign counsel files one original copy of a Notice of Second Supplemental Authority, with a copy of the opinion from the United States Court of Appeals for the Third Circuit.

I certify that on this the 21st day of April, 2003, a copy of the Notice of First and Second Supplemental Authority with opinion were caused to be served on the following person by U.S. Mail:

The Hon. Theodore Olson
Solicitor General of the United States
Department of Justice, Room 5614
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Washington, DC 20530-0001

Mr. Patrick H. Stiehm, Esq.
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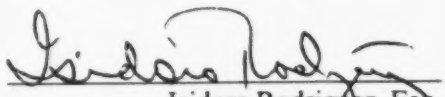

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APR 25 PAGE 3

No. 02-1268

Supreme Court, U.S.
FILED
APR 21 2003
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

Isidoro Rodriguez, and his minor Son,
Isidoro Rodriguez-Hazbun

Petitioners,

v.

Amalin Hazbun Escaf,

Respondent.

On Petition For Writ of Certiorari
United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL AUTHORITY IN SUPPORT OF GRANTING THE PETITION FOR WRIT OF CERTIORARI AND JUDICIAL NOTICE OF THE "ZONE OF WAR" THROUGHOUT THE REPUBLIC OF COLOMBIA

Pursuant to the directions of the Clerk's Office, Rodriguez files this Notice of Supplemental Authority of an opinion just issued by the United States Court of Appeals for the Fourth Circuit, in *Fawcett v. Mcroberts*, No. 01-2406 (4th Cir. April 15, 2003), in support of the above referenced petition and motion. The Fourth Circuit held in that action the district court erred in its interpretation and application of the controlling laws regarding "custody" and rights of the parents under the laws of the Contracting State under the Hague Convention on the Civil Aspects of

25 pp

International Child Abduction ("Treaty"), and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C.A. sections 11601-11610 (West 1995).

The authority is specifically pertinent because, it rejects the Hon. Judge T.S. Ellis III's holding that Rodriguez had not rights to protect his Son. In short, it confirms Rodriguez authority and arguments pursuant to the Laws of the Republic of Colombia and the Joint Custody Agreement of his authority to protect the welfare of co-Petitioner Isidoro Rodriguez-Hazbun.

This is consistent with both Treaty and ICARA, which require the federal courts in reviewing Rodriguez's right under the Joint Custody Agreement to comply with the governing Laws of the Republic of Colombia, and the Joint Custody Agreement both which provide for Rodriguez's right as his father, and for visitation and access to Isidoro Rodriguez-Hazbun. Furthermore, the decision is on point since it holds that pursuant to the Treaty and ICARA, the federal court retained jurisdiction to correct the errors which are the bases of the instant Petition, so to order the return of Isidoro to the United States form Colombia.

Isidoro Rodriguez, Esq.
Petitioner in Pro Per
Member of Supreme Court Bar
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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JEAN FAWCETT,

Petitioner-Appellee,

v.No. 01-2406

COLIN MCROBERTS; TAMMY

MCROBERTS,

Respondents-Appellants.

Appeal from the United States District Court
for the Western District of Virginia, at Lynchburg.
Norman K. Moon, District Judge.
(CA-01-59)

Argued: January 24, 2003

Decided: April 15, 2003

Before LUTTIG, MOTZ, and TRAXLER, Circuit Judges.

Reversed and remanded in unpublished opinion. Judge Motz wrote the opinion, in which Judge Luttig and Judge Traxler joined.

COUNSEL

ARGUED: Patricia Emily Apy, PARAS, APY & REISS, P.C., Red Bank, New Jersey, for Appellants. Stephen John Cullen, MILES & STOCKBRIDGE, P.C., Towson, Maryland, for Appellee. **ON BRIEF:** Jamison G. White, MILES & STOCKBRIDGE, P.C., Washington, D.C.; Victor S. Skaff, III, GENTRY, LOCKE, RAKES & MOORE, Roanoke, Virginia, for Appellants.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

After Colin McRoberts and Jean Fawcett divorced, Mr. McRoberts moved from Scotland to Virginia with the couple's son, Travis. Ms. Fawcett filed a petition in federal court in Virginia requesting that the court order Travis's return to Scotland pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"), and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C.A. §§ 11601-11610 (West 1995). The district court granted Ms. Fawcett's petition and Mr. McRoberts has appealed. Because the district court erred in its interpretation and application of Scottish law, we reverse and remand to the district court for further proceedings consistent with this opinion.

I.

BEST AVAILABLE COPY

Mr. McRoberts and Ms. F. .ett married in Scotland in 1986. During their marriage they had two children: Melody (whose custody is not at issue here), in 1990, and Travis, in 1994. By 1998, their marriage was experiencing difficulties, and on November 20, 1998, a Scottish Sheriff Court issued a decree divorcing Mr. McRoberts and Ms. Fawcett. This divorce decree made a "Residence Order in respect of . . . TRAVIS COLIN PATRICK MCROBERTS . . . requiring that [he] live with" Mr. McRoberts, and a "Contact Order" that allowed Ms. Fawcett contact with Travis on weekends and other specified times, for two weeks during the summer, and one week during each of the October, Christmas, and Easter holidays.

Over the next two and a half years, Ms. Fawcett made more than fifty attempts to modify her contact order. The record reveals only two instances in which the Sheriff Court modified the order; in each case, it imposed *greater limitations* on Ms. Fawcett's contact rights. A February 11, 2000 order restricted Ms. Fawcett's visits with Travis to "every second Saturday between 10 a.m. and 5 p.m.," and required that the visits be supervised. A June 23, 2000 order created a four-week contact cycle granting Ms. Fawcett no contact in Week 1, "residential contact" on the weekend of Week 2, no contact in Week 3, and Saturday contact in Week 4.

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In February 2001, Ms. Fawcett grew concerned that Mr. McRoberts might take Travis to the United States and sought an interdiction order from the Sheriff Court to prevent Mr. McRoberts from doing so.

On February 15, the Sheriff Court "refuse[d] [the] same as Mr. McRoberts . . . gave an undertaking to the Court that he will not remove the aforementioned children from Scotland to the United States. . . ." The court then adjourned the hearing "for further evidence to be led."

Sometime shortly after this hearing, Mr. McRoberts and his second wife, Mrs. Tammy McRoberts, moved to the United States with Travis, and took efforts to conceal his whereabouts from Ms. Fawcett.

In an opinion issued March 29, 2001, the Sheriff Court, "on the Motion of [Ms. Fawcett] Sist[ed] the cause pending the outcome of a `Hague Convention' application to be made by [Mr. McRoberts]."[1] The court held that Mr. McRoberts

(1) unlawfully and wrongfully removed [Travis] outwith the jurisdiction of this Court without the express permission of [Ms. Fawcett] in Contravention of her parental rights in terms of Section 2(3) and 2(6) of the Children Scotland Act 1995; (2) failed to attend the diets of this Court on 26 and 29 March 2001 without an acceptable excuse; (3) removed [Travis] from the jurisdiction of this Court by taking him to the United States of America in breach of a specific undertaking . . . not to do so pending determination of the present proceedings; and (4) Continues to retain [Travis] in the United States of America without disclosing his present whereabouts thereby depriving [Ms. Fawcett] of lawful contact with the said child.

The Sheriff Court then fou. . Mr. McRoberts in contempt of court, fined him, and instructed the Sheriff Clerk to "take all necessary steps . . . to recover" the fine.

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[1] ***Webster's Third New International Dictionary*** 2128 (1993) defines "Sist" as "1. *chiefly Scot*: to bring into court: SUMMON 2. *chiefly Scot*: a stay or suspension of legal proceedings; *also* : an order for a stay of proceedings."

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On September 25, 2001, a lawyer acting for Ms. Fawcett filed a Petition for Return of Child and a Request for Emergency Ex Parte Hearing in the United States District Court for the Western District of Virginia. The court granted her request for an emergency *ex parte* hearing, which it held later that day. The court also held a hearing on that same day at which Mr. McRoberts was present and testified. In that proceeding, the court verbally ordered Mr. McRoberts not to remove Travis from the jurisdiction or seek any state court order. On October 2, 2001, the court held another hearing on Ms. Fawcett's petition, at which Mr. McRoberts again presented the only testimony. On October 11, the district court granted Ms. Fawcett's petition and ordered that Travis be taken into custody by the Bedford County Department of Social Services and returned to the jurisdiction of the Sheriff Court in Ayr, Scotland. *Fawcett v. McRoberts*, 168 F. Supp. 2d 595 (W.D. Va. 2001). Mr. McRoberts complied with this order and Travis was returned to Scotland. The court also ordered Mr. McRo-

berts to pay costs and Ms. Fawcett's attorney's fees. Mr. McRoberts filed a timely appeal from both orders.

II.

As a threshold matter, we must determine whether Mr. McRoberts's appeal is moot. We have "no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before" us. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). Though Ms. Fawcett does not contend that the case is moot, a court must resolve issues such as mootness, that concern its own jurisdiction, even when the parties do not raise such issues. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983).

Of course, "compliance [with a trial court's order] does not [ordinarily] moot an appeal [of that order] if it remains possible to undo the effects of compliance or if the order will have a continuing impact on future action." 13A Charles A. Wright, et al., *Federal Practice & Procedure* § 3533.2 (2d ed. 1984); *see also Graddick v. Newman*, 453 U.S. 928, 937 (1981) (concluding that Court had the "power . . . to

enter an injunction ordering restoration of the prior status quo"); *id.* at 945 n.* (Rehnquist, J., writing separately) ("[I]ssuance of a court's mandate or obedience to its judgment does not bar timely appellate review.") (citations omitted)). However, because in compliance with

the district court's order in this case Travis has returned to Scotland, we must assure ourselves that a decision by this court can "affect the matter in issue." *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted). We believe that a decision favorable to Mr. McRoberts can clearly "affect the matter in issue" in this case.

Indeed, our recent opinion in *Miller v. Miller*, 240 F.3d 393 (4th Cir. 2001), is an implicit adoption of this view. In that case we considered the merits of an appeal from an order returning a child to Canada, even though the father had complied with the order, and the child was in Canada at the time of the appeal. *Id.* at 395, 404. Although we ultimately affirmed the district court's order, we could not have considered the merits of the appeal if the case had been rendered moot by the child's return to Canada pursuant to the district court's order. *See Steel Co.*, 523 U.S. at 94 (rejecting notion that courts may exercise "hypothetical jurisdiction").

The overwhelming majority of other courts have also evidenced their agreement with this position by routinely considering the merits of an appeal from an order returning a child to a foreign country, even when compliance with the order has resulted in the child's presence in a foreign country. *See, e.g.*, *Ohlander v. Larson*, 114 F.3d 1531, 1538-39 (10th Cir. 2000) (rejecting mother's arguments that her petition should be dismissed because it "was moot and because [the child] was no longer in Utah" and noting that accepting such arguments "could give parents an undue incentive to flee from Hague Conven-

tion proceedings"); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (reviewing merits of an appeal, even after child had been returned to Greece in compliance with trial court order made pursuant to Convention and ICARA); *see also, e.g.*, *Rydder v. Rydder*, 49 F.3d 369 (8th Cir. 1995) (reviewing merits of appeal from district court order that child be returned to foreign country pursuant to Convention and ICARA and in which no stay appears to have been issued); *Dalmasso v. Dalmasso*, 9 P.3d 551 (Kan. 2000) (same);

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Sampson v. Sampson, 975 P.2d 1211 (Kan. 1999) (same); *Harkness v. Harkness*, 577 N.W.2d 116 (Mich. Ct. App. 1998) (same).

Indeed, at least two appellate courts have recently granted the precise relief Mr. McRoberts seeks, *i.e.*, reversal of a trial court's order returning a child to a foreign country even after the child has left the United States. *See In re Marriage of Jeffers*, 992 P.2d 686, 689, 692 (Co. Ct. App. 1999) (reversing "[t]he portion of the judgment returning the children to Greece" notwithstanding fact that children had already been returned to Greece in compliance with original order); *Bless v. Bless*, 723 A.2d 67, 75 (N.J. Super. Ct. 1998) (reversing and remanding to trial court, concluding "that jurisdiction has not been obliterated by [the child's] court-ordered presence in Switzerland"). Obviously these courts too concluded that their decision would "affect the matter in issue." *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted).

Notwithstanding this wealth of authority, and without acknowledg-

ing any of it, the Eleventh Circuit recently did dismiss as moot an appeal from a district court's order that a child be returned to a foreign country. *Bekier v. Bekier*, 248 F.3d 1051 (11th Cir. 2001). The district court had ruled that Ms. Bekier had wrongfully removed the child from his habitual residence in Israel. *Id.* at 1053. Ms. Bekier appealed, requesting that the court reverse the decision below or remand for further evidentiary hearings. *Id.* at 1054. While her appeal was pending, Mr. Bekier returned to Israel with their son. The Eleventh Circuit held Ms. Bekier's appeal moot because the return of the child to Israel left the court "powerless to grant the relief requested by Ms. Bekier." *Id.* at 1055; *cf. March v. Levine*, 136 F. Supp. 2d 831, 861 (M.D. Tenn.), *aff'd*, 249 F.3d 462 (6th Cir. 2001) (granting stay of order to return child, "[r]ecognizing that immediate return of the children to Mexico *may* effectively moot any appeal" (emphasis added)).

It is unclear why the *Bekier* court came to this conclusion. Although it cites several cases that purportedly support its mootness holding, all of those cases involve markedly different facts. For example, the *Bekier* court relied heavily on *B&B Chemical Co., Inc. v. United States EPA*, 806 F.2d 987, 989 (11th Cir. 1986), a case holding that a challenge to the execution of a warrant to enter property

was moot because the warrant had already been executed.[2] *B&B Chemical* was moot, however, because it would have been literally impossible to "un-enter" the property, even if the court had so

ordered. The same logic applied to finding the university's appeal moot in *University of Texas v. Camenisch*, 451 U.S. 390, 398 (1981), where the university had complied with a court order to provide Camenisch with a sign-language interpreter, and Camenisch had graduated while the appeal was pending. Because the interpreter had already been provided, it would have been literally impossible for the court to un-provide the service (short of reversing time - a power that, perhaps regrettably, Congress has not yet granted the United States Courts of Appeals). As one court has noted, in some cases, like these, once an action has been taken "there is no way to unscramble the egg." *In re Ford*, 110 F.3d 954, 963 (3d Cir. 1997).

Such cases, however, present altogether different issues than the case at hand. Here, no law of physics would make it impossible for Ms. Fawcett to comply with an order by the district court that she return Travis to the United States. To the contrary, such orders are fully within the district court's power and are commonly issued by courts in the United States. *See, e.g.*, *Ohlander*, 114 F.3d at 1535; *Goldstein v. Goldstein*, 494 S.E.2d 745, 747 (Ga. Ct. App. 1998); *Hernandez v. Branciforte*, 770 N.E.2d 41, 45, 49 (Mass. Ct. App. 2002); *Roszkowski v. Roszkowska*, 644 A.2d 1150, 1160 (N.J. Super. Ct. 1993); *In re Vernor*, 94 S.W.3d 201, 206 (Tex. Ct. App. 2002); *Johnson v. Johnson*, 493 S.E.2d 668, 671 (Va. Ct. App. 1997); *see also, e.g.*, *Horlander v. Horlander*, 579 N.E.2d 91, 97 (Ind. Ct. App.

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[2] The *Bekier* court also cited two unpublished opinions in which a case

involving a petition under the Hague Convention was dismissed as moot. *See Bekier*, 248 F.3d at 1055 (citing *Brown v. Orange County Dep't of Soc. Serv.*, 1996 U.S. App. Lexis 15921 (9th Cir. July 1, 1996); *Mahmoud v. Mahmoud*, 1997 WL 43524 (E.D.N.Y. Jan. 29, 1997)). These cases, however, like *B&B Chemical*, have no bearing on the mootness of Mr. McRoberts's appeal. Though both cases involved children who had been removed from the United States, this was not the basis of the courts' mootness holding. Rather, both the appellant in *Brown v. Orange County*, and the petitioner in *Mahmoud*, already had physical custody of their children, and had thus received the primary relief they sought. Mr. McRoberts, however, has plainly not yet received the relief he now seeks.

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1991) (concluding that court had jurisdiction to issue custody order even though child was in foreign country); *Ivaldi v. Ivaldi*, 685 A.2d 1319, 1326 (N.J. 1996) (same); *Middleton v. Middleton*, 314 S.E.2d 362, 367 (Va. 1984) (same).

One concern that may have prompted the *Bekier* court's decision is that while the remedy Ms. Bekier sought might not have been *impossible* to grant, as it was in *B&B Chemical*, the *Bekier* court may have believed that there would have been no mechanism for effectively *enforcing* an order that a child living outside the United States be returned to this country. *See Bekier*, 248 F.3d at 1054 ("Ms. Bekier's potential remedies now lie in the Israeli courts. Any words by us would be merely advisory.").

As an initial matter, it is not at all clear to us that a lack of effective methods for enforcing a court order necessarily means that the court's opinion "cannot affect the matter in issue," *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted), and therefore renders the case moot. In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), for example, there was little hope that any court would be able to enforce a judgment against Radovan Karadzic, who was, at the time, the President of the self-proclaimed Bosnian-Serb republic "Srpska." *See* Jerry Adler, *Suing Bin Laden*, American Lawyer, Nov. 2001 at 30 (noting that even one of the plaintiffs' lawyers didn't "really expect the plaintiffs to collect anything from Karadzic, who is still a fugitive from the International War Crimes Tribunal at The Hague."). Nevertheless, the Second Circuit did not dismiss the plaintiffs' claims as moot, but rather after reversing the district court's holding that no jurisdiction existed, remanded to allow the case to proceed. *Kadic*, 70 F.3d at 236. Nor was enforcement regarded as a stumbling block in the cases cited above in which courts ordered a child returned to the United States from a foreign country. *See ante* at 7-8.

However, even if, hypothetically, the lack of an enforcement mechanism could leave a court completely unable to "affect the matter in issue," and render an appeal moot, Mr. McRoberts's appeal would still not be moot because he does have a mechanism for enforcing a judgment by this court or the district court on remand. The Child Abduction and Custody Act 1985, the United Kingdom's analogue to

ICARA, codifying the Hague Convention there, provides that "[a] decision to which [Articles 7 and 12 of the Hague Convention] appl[y] which was made in a Contracting State other than the United Kingdom shall be recognized in each part of the United Kingdom as if made by a court having jurisdiction to make it in that part." 1985, c. 60, Pt. II, § 15. Furthermore, that statute explicitly contemplates a revocation or variation of an order issued by a Contracting State and previously recognized by a court in the United Kingdom, and provides that in such circumstances the United Kingdom court shall either cancel its original order, § 17(2), or vary it, § 17(3). *See* c.60, Pt. II, § 17. Thus, Mr. McRoberts would be able to seek enforcement through the United Kingdom's courts of an order that Ms. Fawcett and Travis return to Virginia, were the district court, on remand, to issue such an order.

Although Mr. McRoberts could have proceeded directly to the United Kingdom's courts without seeking a reversal of the district court's order in the United States, there can nonetheless be no question that an order from the district court that Ms. Fawcett return to the United States with Travis would "affect the matter in issue in [this] case." *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted). Such an order would permit Mr. McRoberts to appear in the Scottish courts simply to seek enforcement of the United States judgment, rather than to re-argue the merits of any custody dispute respecting Travis (if, indeed, there even is a dispute

over who has the right to ...tody of Travis).

Furthermore, even if the United Kingdom's courts did not recognize the order of a United States court, such an order could still "affect the matter in issue." *Id.* For example, Ms. Fawcett could comply with the court's order of her own volition. Or, if Ms. Fawcett failed to comply with the order, she could be held in contempt, and penalties could be assessed. *See, e.g., Ohlander*, 114 F.3d at 1535; *Hernandez*, 770 N.E.2d at 49. Alternatively, it seems not too remote a possibility that Ms. Fawcett could at some point return to the United States with Travis, at which time Mr. McRoberts could seek to enforce such an order. *Cf. Michigan v. Doran*, 439 U.S. 282, 285 n.2 (1978) (rejecting argument that appeal from order granting writ of habeas corpus was moot because the prisoner had been released and could no longer be located (citation omitted)); *Eagles v. United States ex rel. Samuels*,

329 U.S. 304, 307-08 (1946) ("Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. Affirmance makes the prisoner's release final and unconditional. Reversal undoes what the habeas corpus court did and makes lawful a resumption of the custody." (citations omitted)). In sum, it is clear that a decision reversing the district court's order in this case does not violate the prohibition against "opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before

it." *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted). We therefore conclude that Mr. McRoberts's appeal is not moot, and turn now to the merits of that appeal.[3]

III.

In an action under the Convention and ICARA, a petitioner must "establish, by a preponderance of the evidence, that her child[ ] w[as] `wrongfully removed or retained within the meaning of the Convention.'" *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001) (quoting 42 U.S.C. § 11603(e)(1)(A)). The Convention provides that:

> The removal or the retention of a child is to be considered wrongful where -
>
> [a] it is in breach of rights of custody attributed to a person, an institution or any other body . . . under the law of the State in which the child was habitually resident, immediately before the removal or retention; and

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[3] Even if Mr. McRoberts's appeal were otherwise moot, we would still have ancillary jurisdiction to consider his appeal based on the district court's order that Mr. McRoberts pay Ms. Fawcett's attorney's fees and costs. *See Arlington County Republican Comm. v. Arlington County*, 983 F.2d 587, 596 (4th Cir. 1994) (denying motion to dismiss appeal as moot because appellate court's determination of underlying action "may affect the amount of the attorneys' fees award").

> [b] at the time of removal or retention those rights were

actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Convention, art. 3.

In this case, the district court held that Mr. McRoberts wrongfully removed Travis from his habitual residence in Scotland, in breach of the "rights of custody," held by both Ms. Fawcett and the Sheriff Court. The court also held that both Ms. Fawcett and the Sheriff Court were actually exercising their custody rights at the time of Travis's removal. We address first Ms. Fawcett's asserted rights of custody, and then those of the Sheriff Court.

A.

The Convention provides that the removal of a child is wrongful if "it is in breach of rights of custody," Convention, art. 3(a), with "rights of custody . . . includ[ing] rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Convention, art. 5(a). The Convention also defines, by contrast, "rights of access," which "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention, art. 5(b).

The district court correctly noted that Section 2 of the Children (Scotland) Act provides that a parent has the right, *inter alia*, "`to have the child living with him *or otherwise to regulate the child's residence*' and `if the child is not living with him, *to maintain personal relations and direct contact with the child on a regular basis*.'" *Faw-*

cett, 168 F. Supp. 2d at [illegible] (quoting Children (Scotland) Act §§ 2(1)(a), (c)) (emphasis added by district court). The court found that this statute gave Ms. Fawcett, as one of Travis' parents, the right to determine his residence, and thus, "rights of custody" as defined by the Convention.

The rights provided under § 2 of the Children (Scotland) Act, however, can be modified by court order or decree. Section 11 of that stat-

ute explicitly provides that a Sheriff Court may make "an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child." Children (Scotland) Act § 11(2)(a).[4]

In this case, the Sheriff Court did precisely that - the decree it issued divorcing Mr. McRoberts and Ms. Fawcett modified the parental rights that Ms. Fawcett would have otherwise had under § 2 of the Children (Scotland) Act. The "Residence Order" contained in the decree gives Mr. McRoberts the exclusive power to determine Travis's residence, thereby necessarily depriving Ms. Fawcett of that same right. Indeed, Ms. Fawcett's counsel conceded at oral argument that Ms. Fawcett had no right to determine Travis's residence within Scotland, and that that right rested exclusively with Mr. McRoberts.

As the Scottish Court of Sessions noted in *Donofrio v. Bũrrell*, 2000 S.C.L.R. 465 at 16 (1999), a parent "clearly" loses "[her] `rights of custody' [under the Convention] if the other parent is awarded a residence order." Thus, Ms. Fawcett's attorney admitted before the

district court that "under ... divorce decree and the subsequent interim orders, [Mr. McRoberts had] the notion of custody." *See also In re H (A Minor)*, 1999 WL 1319095, at *2 (House of Lords 1999) (noting without disapproval lower court's rejection of a parent's claim to "rights of custody" under Convention based on contact order and parent's failure to appeal the issue). Because the divorce decree of the Sheriff Court deprived Ms. Fawcett of her right to determine Travis's place of residence, the district court erred in holding that Ms. Fawcett had "rights of custody" as that term is used in the Convention.[5]

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[4] Ms. Fawcett's similar argument that § 3 of the Children (Scotland) Act grants her affirmative rights as a mother, in addition to her rights as a parent under § 2, is subject to similar analysis (and rejection) because the rights under § 3, like those under § 2, can be modified by court orders made pursuant to § 11.

[5] The district court acknowledged that § 11 of the Children (Scotland) Act permitted a court to modify the parental rights provided under § 2. But after noting that "the contempt order [against Mr. McRoberts] stated that Travis's abduction was `in Contravention of her parental rights,'" the court found no "evidence that the sheriff court in Ayr has deprived Ms. Fawcett of her parental rights." *Fawcett*, 168 F. Supp. 2d at 602 n.11

While Ms. Fawcett has conceded that she had no right to determine Travis's residence within Scotland, she argues that § 2(3) of the Children (Scotland) Act gives her some rights to determine Travis's place

of residence, and thereby confers upon her "rights of custody" under the Convention. Section 2(3) of the Children (Scotland) Act provides that, "[w]ithout prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below." Subsection (6), in turn, applies subsection (3) to a person "who for the time being has and is exercising in relation to him" either the right "to have the child living with him or otherwise to regulate the child's residence" or "if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis." Children (Scotland) Act §§ 2(6), 2(3)(a) & (c). Assuming Ms. Fawcett was exercising the right to maintain personal relations and direct contact with Travis, § 2(3) does appear to prohibit Mr. McRoberts from removing Travis from the United Kingdom without Ms. Fawcett's consent. Indeed, Mr. McRoberts makes no argument to the contrary. What Mr. McRoberts does contest is Ms. Fawcett's assertion that the prohibition contained in § 2(3) conferred "rights of custody" upon her.

Two of our sister circuits have recently considered this question and agreed with Mr. McRoberts, rejecting arguments very similar to Ms. Fawcett's. Both *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), and *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), involved parents who brought a child to the United States in contravention of a *ne exeat* clause. Ms. Fawcett concedes that the substance of such clauses

(quoting Sheriff Court's c...empt order). However, as explained above, the Sheriff Court's original divorce decree (not the later contact or contempt orders) deprived Ms. Fawcett of certain parental rights. Of course, the divorce decree also permitted Ms. Fawcett to retain other parental rights. Thus, while Travis's removal may have been "in contravention" of Ms. Fawcett's parental right to maintain contact with Travis, the removal was not "wrongful" within the terms of the Convention because the Sheriff Court had previously deprived Ms. Fawcett of the parental right to determine Travis's place of residence, and therefore she did not retain "rights of custody" of Travis under the Convention.

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is indistinguishable from that of § 2(3) of the Children (Scotland) Act. Both the Second and Ninth Circuits held that a *ne exeat* clause does not confer "rights of custody" under the Convention upon a parent who otherwise holds only "rights of access." *Gonzalez*, 311 F.3d at 944; *see also Croll*, 229 F.3d at 135 (same). They reasoned that such clauses grant, "at most, a veto power." *Gonzalez*, 311 F.3d at 949; *see also Croll*, 229 F.3d at 140 (same). Thus, like § 2(3) of the Children (Scotland) Act, these clauses "serve[ ] only to allow a parent with access rights to impose a limitation on the custodial parent's right to expatriate his child. . . . [T]his hardly amounts to a right of custody." *Gonzalez*, 311 F.3d at 949. We find the reasoning of those courts persuasive and hold that § 2(3) of the Children (Scotland) Act does not confer "rights of custody" on Ms. Fawcett.

B.

The district court also found that "Travis was the subject of rights of custody "attributed to . . . an institution," namely, the Sheriff Court. *Fawcett*, 168 F. Supp. 2d at 603 (quoting Convention, art. 3). In so ruling, the district court misapprehended the nature of the proceedings pending in the Sheriff Court at the time Mr. McRoberts took Travis from Scotland, and therefore erred in its conclusion that the Sheriff Court was exercising "rights of custody" over Travis at the time of Travis's removal.

In reaching the conclusion that the Sheriff Court in Scotland was exercising "rights of custody" over Travis, the district court relied primarily on a case arising from a custody dispute in Ireland, *In re H*, 1999 WL 1319095. In *In re H*, a court initially awarded custody of the child to her mother, and gave only access rights to the child's father. Two years later, the father applied for guardianship, which under Irish law would have conferred upon him equal rights of custody. *Id.* at *4. *While the father's application for guardianship was pending*, the mother left Ireland with the child and the father petitioned under the Convention for return of the child. The House of Lords held that the Irish court "had rights of custody in respect of H. at the time of her removal and that these rights were being exercised *by reason of the pending application* of her father to be appointed her guardian." *Id.* (emphasis added).

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Though we are obviously not bound by a decision from the House of Lords, judicial "opinions of our sister signatories" to the Conven-

tion are "entitled to consi...able weight." *Air France v. Saks*, 470 U.S. 392, 404 (1985) (internal quotation marks and citation omitted). Thus, we will accept the holding of *In re H*, and assume, without deciding, that if an "application to the court . . . raise[s] matters of custody within the meaning of the Convention" the court may have "rights of custody," and further that a third party (such as a parent) may assert those rights in a petition for return of child. *In re H*, 1999 WL 1319095, at *3.

Even granting Ms. Fawcett the benefit of these assumptions, however, her argument fails because the application pending in the Sheriff Court *at the time* Mr. McRoberts left Scotland with Travis did not "raise matters of custody within the meaning of the Convention." *Id.* Indeed, Ms. Fawcett conceded at oral argument that she had not been seeking a residence order with respect to Travis at either the February 15 hearing, or in any other application pending before the Sheriff Court, but was rather seeking a court order prohibiting Mr. McRoberts from leaving Scotland.

Ms. Fawcett's application thus did not "raise matters of custody within the meaning of the Convention." *Id.* Even if the Sheriff Court had issued the order Ms. Fawcett had been seeking, the order would not have conferred any greater "rights of custody" on Ms. Fawcett than § 2(3) of the Children (Scotland) Act, or the *ne exeat* clauses discussed in *Gonzalez*, 311 F.3d at 944, and *Croll*, 229 F.3d at 135. *See ante* at 13-14. Therefore, the matter pending before the Sheriff Court did not "raise matters of custody within the meaning of the Conven-

tion," *In re H*, 1999 WL . .9095, at *3, and the Sheriff Court was not "actually exercis[ing]" any "rights of custody" over Travis at the time of his removal from Scotland. Convention, art. 3.

IV.

In sum, the district court erred in holding that Ms. Fawcett or the Sheriff Court had "rights of custody" under the Convention.[6] Accordingly, we reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED

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[6] In light of this holding, we must also hold the district court erred in awarding costs and attorney's fees to Ms. Fawcett.

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